UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SUZANNE Q. LITTLE, individually and as Personal Representative of the Estate of SAMUEL MARTIN LITTLE, deceased,

Plaintiff(s),

vs. CIVIL ACTION NO. 2:98-1879-23

BROWN & WILLIAMSON TOBACCO CORPORATION, individually and as successor by merger to THE AMERICAN TOBACCO COMPANY, and R.J. REYNOLDS TOBACCO COMPANY,

Defendant(s).

VOLUME II - PART 2

CONTINUED VIDEO DEPOSITION OF: JUDITH P. WILKENFELD

DATE: Tuesday, April 25, 2000

TIME: 9:07 a.m.

LOCATION: Offices of
Charleston Place Hotel
130 Market Street
Charleston, South Carolina

TAKEN BY: Attorneys for the Defendant(s)

REPORTED BY: MADONNA M. FARRELL
REGISTERED PROFESSIONAL REPORTER

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NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE
BY: CHARLES PATRICK
AND: JERRY EVANS

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Studies http://tobaccoindustrydocuments.ucsf.edu/docs/ftfl0001

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ALSO PRESENT:

CHARLES EDMONDS, VIDEOGRAPHER

(INDEX AT REAR OF TRANSCRIPT)

BY MS. PARKER:
Q. Ms. Wilkenfeld, can you answer my question now?
A. Could you repeat it, please?
MS. PARKER: Could you read it back, please?
(The Court Reporter read the last question asked from Volume 2, Part 1 of Judith Wilkenfeld on April 25, 2000.)
THE DEPONENT: Yes, I considered it.
BY MS. PARKER:
Q. Did you have any discussions with anyone about that issue?
A. I had discussions with myself. I went through the rules of ethics.
Q. You had discussions with yourself?
A. Yes.
Q. Did you have discussions with anyone besides yourself?
A. No -- uh, no.
Q. Now, one theory on why --
A. Can I say one more thing?

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Q. There's no question pending.
MR. PATRICK: Well, I think she might be entitled to explain her answer, so...
THE DEPONENT: Okay. The letter is written

by me as the chair of the Committee of Tobacco Product Change. My role in that committee is as chair. I am not a -- I am not acting as a lawyer in that matter. I may -- this is a committee of people who are interested in an issue. In no way is my communications -- have any legal overtones. It's as a member of a committee to a person in a company, period.

BY MS. PARKER:

Q. All right. Now, one theory about why actual yields that smokers get varies is known as compensation, correct?

A. Correct.

Q. And under this theory, a smoker who switches to a low-tar brand compensates by smoking the low-tar cigarette differently in order to get a higher level of nicotine, correct?

A. Smokes it -- yes.

Q. Okay. And wouldn't you agree that not all smokers engage in compensatory smoking, correct?

A. All smokers smoke differently. I would say that all smokers compensate in the sense that all smokers -- I believe that smokers smoke cigarettes, most smokers smoke cigarettes to get a certain amount of nicotine, so if that's compensation, then, yes.

Q. Well, my question was, don't you agree that not all smokers engage in compensatory smoking?

A. That's too broad for me to say yes; it's too broad of a question, too broad of a statement.

Q. Well, do you have an opinion on whether or not all smokers engage in compensatory smoking?

A. The data that I've looked at are either, you know, forced crossover studies or population studies, and they all show that smokers can get different amounts of nicotine from a cigarette, depending upon what they desire. So you could call that compensation.

If the question is, does anybody get the FTC tar and nicotine rating when they smoke --

Q. No, that's not the question.

A. Okay.

Q. Here's my question: Do you have an opinion on whether or not all smokers engage in compensatory smoking behavior?

A. The way I see compensation, yes, I believe that all or most probably do.

Q. Now, do you agree that some smokers are aware of their compensatory smoking behavior?

A. Aware of all of their types of compensatory behavior?

Q. Any, aware of any of their --

A. Some are aware of some of their behaviors.

Q. Okay. And that was like Martin Little in this case, was aware of his compensatory smoking behavior,

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correct?
A. I have no knowledge about Martin Little's smoking behavior.
VIDEOGRAPHER: Counselor, can we go off the record to change tapes, please?
MS. PARKER: Yes.
VIDEOGRAPHER: Off the record at approximately 11:21.
(Off the record.)
VIDEOGRAPHER: Back on the record at 11:22.
BY MS. PARKER:
Q. All right. Let me show you now what has been marked as Exhibit 71.
(DFT. EXH. 71, Article "Pharmacological Basis for the Tobacco Smoking Habit" by A.K. Armitage, was marked for identification.)
BY MS. PARKER:
Q. That's a study by Armitage called "Pharmacological Bases for the Tobacco Smoking Habit." Have you seen this article prior to today?
A. I don't know.

Q. You don't know?
A. No.
Q. Okay.
A. I did not see this in regards to my work at the FTC. If I saw it at all, it would have been at the FDA, and I just saw so much there I can't testify one way or the other as to what I did or didn't see. I'm not familiar with this so...
Q. And this article is dated 1968; is that correct?
A. Right.
Q. Let me ask you, if you will, to look at the first page there, under the heading "Nicotine Absorption During Cigarette Smoking"; do you see that heading?
A. Yes.
Q. Okay. The first sentence says, "The nicotine content of a puff of tobacco smoke is dependent on the way in which a cigarette is smoked"; do you see that?
A. I do.
Q. Okay. And then it goes on, on the next page, which is page 2 of this document, but page 332 of the article, if you look at the very bottom, the last line of the left-hand column that continues over to the right-hand column --
A. Yeah, I'm actually having a lot of trouble reading this, truthfully.

Q. Okay. Well, can you follow along as I'm reading?
A. Yeah.
Q. It says, "Someone smoking a cigarette has literally fingertip control --
A. I'm sorry; now, I'm not clear where you are.
Q. The very last line.
A. Oh, in the middle of a sentence.
Q. Okay. Someone smoking a cigarette -- or I'll start at the beginning then. "It is worth noting that someone smoking a cigarette has literally fingertip control of how much nicotine he takes into his mouth. By

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reducing the puff volume or inhaling less frequently, he absorbs less nicotine."

A. Right.

Q. Now, this Armitage study was publicly available; isn't that correct?

A. If it was published in Nature magazine, as it says, then it was publicly available.

(DFT. EXH. 72, 9/19/70 Article "Puffing Frequency and Nicotine Intake in Cigarette Smokers," was marked for identification.)

BY MS. PARKER:

Q. All right. Let me show you now what we've

marked as Exhibit 72, and that is a study published in 1970 by Ashton, A-s-h-t-o-n; is that correct?

A. Correct.

Q. And this article is called "Puffing Frequency and Nicotine Intake in Cigarette Smokers."

All right. Let me bring your attention over to page 2, under the section that says "Results," over on the left-hand side; do you see that?

A. Yes.

Q. Okay. This is the paragraph that's the next to the last one, in the left-hand column, and it's titled "Puff Frequency"; do you see that paragraph?

A. Yes.

Q. Okay. If you look at the next to last sentence there, it begins "Hence"; do you see that sentence?

A. Yes.

Q. It says, "Hence, these results suggest that the subjects smoking the low-nicotine cigarettes were attempting to compensate for the high-filter retention of nicotine by a faster puffing rate." Did you see that?

A. Yes.

Q. And this Ashton study was publicly available; isn't that correct?

A. I'm having trouble. Is this the British Medical Journal? I can't tell that the --

Q. Yes, it's published in 1970 in the British Medical Journal.

A. Then if that's where it was published, then it was publicly available.

Q. Ms. Wilkenfeld, I want to ask you now to refer to an exhibit that was marked on the first day of your deposition, and I understand that those exhibits are in numerical order, so if I could ask you to look at Number 49.

A. (Indicating)

Q. Yes, that's it.

A. Okay.

Q. Okay. And, again, we marked that previously as Exhibit 49, and it's an article by Dr. Elson and Dr. Bates -- Betts, and it was published in the Journal of the National Cancer Institute, correct?

A. Yes.

Q. Okay. Let me bring your attention over to page 1889 of the article.

Are you to that page?

A. Uh-huh.

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Q. Okay. If you look over on the right-hand column, the very last paragraph that begins "In the smoke"; do you see that?
A. Yes.

Q. Okay. If you skip on down to the next sentence, which will be the second sentence of the paragraph, it states, "Is there not some danger, therefore, that the smoker of these cigarettes, in order to achieve his quote, "nicotine satisfaction," end quote, "will smoke more, or what is perhaps more serious, will increase his tendency to inhale." Do you see that statement?
A. Yes.
Q. And this study by Dr. Elson was publicly available, correct?
A. This is in the Journal of the National Cancer Institute.
Q. Is that a yes?
A. Yes.
Q. Now, are you familiar with Dr. Michael A. Russell?
A. Yes.
Q. Would you consider him authoritative on issues of smoking and health?
A. Authoritative? He has some interesting theories that are not totally accepted, but he's authoritative.

(DFT. EXH. 73, Article "Comparison of Effect on Tobacco Consumption and Carbon Monoxide Absorption of Changing to High and Low Nicotine Cigarettes," by M.A.H.

Russell,
et. al, was marked for identification.)

BY MS. PARKER:
Q. All right. Let me show you now what we have marked as Exhibit 73. Exhibit 73 is an article published in the British Medical Journal in 1973 by Dr. Russell and others, correct?
A. Correct.
Q. Let me bring your attention to page 512 of that article, which is actually the first page. Okay. If you look over on the right-hand column, the first full paragraph there, it begins "Safer though it may be"; do you see that?
A. Yes.
Q. Okay. If you look at the third sentence, it says, "It has, for instance, been clearly shown in two independent studies that smokers unconsciously modify their puff rate to regulate their nicotine intake. When smoking a high-nicotine cigarette, they puffed less often and when smoking a low-nicotine cigarette, they increased their puff rate and thus compensated for the low-nicotine yield." Do you see that statement?
A. Yes.
Q. And this study by Dr. Russell was publicly available, correct?

A. It was in the British Medical Journal, yes.
Q. Yes?
A. It was publicly available.

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Q. All right. And Dr. Gio Gori has also talked about compensation as early as 1978, correct?
A. I don't know.
Q. You don't know. Okay.
(DFT. EXH. 74, 9/15/78 Article by Gori and Article, "Toward Less Hazardous Cigarettes," was marked for identification.)
BY MS. PARKER:
Q. Let me show you what we've marked as Exhibit 74. That's an article by Dr. Gio Gori that was published in the Journal of the American Medical Association in 1978, correct?
A. Correct.
Q. And let me bring your attention to page 1258 of that article, the middle column; are you there? It's a prior page.
A. Okay.
Q. All right. If you look at the middle column, the second paragraph begins "With the introduction"; do you see that?
A. Yes.

Q. Okay. It says, "With the introduction of relatively low-nicotine yields, it has been suggested that some smokers may compensate by increasing the total number of cigarettes smoked to maintain a fixed daily level of nicotine intake." Do you see that?
A. I do.
Q. And this article from the Journal of the American Medical Association by Dr. Gio Gori was publicly available, correct?
A. Correct.
Q. Now, do you recall that the 1979 Surgeon General's Report raised the issue of compensatory smoking?
A. I'm sorry; which one?
Q. 1979 Surgeon General's Report?
A. It may have. I can't swear to it.
(DFT. EXH. 75, "Smoking and Health," a report of the Surgeon General, was marked for identification.)
BY MS. PARKER:
Q. All right. Let me show you what we've marked as Exhibit 75. This is a portion of the 1979 Surgeon General's Report, and I'd like to bring your attention to the second page there, which is little x-i-i, that's the page. If you look at the next to the last sentence on the page, it begins "Some studies"; do you see that?

A. Yes.
Q. It states, "Some studies suggest that individuals who smoke low tar and nicotine cigarettes may inhale more deeply or smoke the cigarette further down the butt to compensate for the lower concentration of nicotine." Do you see that?
A. Yes.
Q. And if you go to the next page, the sentence that begins on the very bottom of the page with the word "Individuals"; do you see that? This is page A-20.
A. And it's in which paragraph?
Q. The very last word "Individuals"; it goes on

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into the next page.
A. Yes.
Q. It states, "Individuals were apparently able to compensate for the lowered tar and nicotine concentrations by inhaling more deeply and by smoking a greater fraction of the cigarette." Do you see that?
A. I do.
Q. Okay. And this is from the 1979 Surgeon General's Report. So now that I have shown you this document, do you agree that the 1979 Surgeon General's Report raises the issue of compensatory smoking?
A. You know, that is reporting on a short-term experiment.

Q. Well, it reported on compensatory smoking, correct?
A. It reported on a short-term experiment which monitored individual changes in consumption, and this is reporting on certain studies. So it's reporting on these studies. I don't know what they -- I can't, on the basis of looking at one or two sentences, tell you what they called this or what they were referring to.
Q. Well, the report uses the word "compensation" or "compensatory smoking" at least twice, correct?
A. On the first page, what sentence did you read me on the first page?
Q. "Some studies suggest that individuals who smoke low tar and nicotine cigarettes may inhale more deeply or smoke the cigarette further down the butt to compensate."
A. Okay. That sentence used the word "compensated" with the double subjunctive. And on page -- on the last one, they use the word "compensate" as a verb. That's all I can testify to, without reading more of it.
Q. And the 1979 Surgeon General's Report was available to the FTC; isn't that correct?
A. Yes.
Q. Now, the 1981 Surgeon General's Report also raised the issue of compensatory smoking; isn't that correct?

A. The 1981 report was called "The Changing Cigarette," and I think it talked about this. That was the whole purpose of it, was to talk about the changing cigarette and...
Q. So you agree that the 1981 Surgeon General's Report raised the issue of compensatory smoking?
A. I can only tell you at this point, without reading it, that it was about the changing cigarette and about the issues raised with -- the issues raised by the new cigarettes.
(DFT. EXH. 76, "The Health Consequences of Smoking, The Changing Cigarette, a report of the Surgeon General", was marked for identification.)
BY MS. PARKER:
Q. Okay. Let me show you what we've marked as Exhibit 76, and that's a portion of the 1981 Surgeon General's Report, and I want to bring your attention to the second page of the document, which is page number 7 of the report. If you look about middle way of the page, there's a paragraph that begins with the word "first"; do

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you see that?
A. Yes.
Q. Okay. The second sentence there says, "If the smoker compensates for reduced yield by increasing the

number of cigarettes, the depth of inhalation, or the volume or frequency of puffs, a reduction in tar might not result in a reduced smoke exposure." Do you see that sentence? Do you see what I read?
A. Yes.
Q. Okay. If you'll turn to the next page.
A. Wait one second.
Okay.
Q. There's a heading that's called "Compensatory Behavior in Smoking"; do you see that?
A. I do.
Q. All right. If you look at the first paragraph under that heading, about midway of the paragraph, there's a sentence that begins with the word "smokers"; do you see that?
A. In the first paragraph, yes.
Q. It says, "Smokers, however, are able to take larger, more frequent, and higher velocity puffs than machines do. It appears that such compensatory adjustments often turn nominally lower tar and nicotine cigarettes into higher tar and nicotine cigarettes." Do you see that reference?
A. I do.
Q. Okay. Will you agree that the 1981 Surgeon General's Report was available to the FTC?

A. Yes.
Q. Now, we've gone over several studies here and Surgeon General's reports. I want to ask you, now, if you'll agree with me that there has been an awareness of compensatory smoking within the public health community since at least 1968?
MR. PATRICK: I'm going to object, but you can answer.
THE DEPONENT: There have been studies that have been published that have talked about that.
BY MS. PARKER:
Q. Those studies are publicly available, correct?
A. Yes. I would certainly agree that the -- well, the '81 study raised it, but didn't solve it, didn't make a definitive recommendation.
As far as going back as far as the 1963, I'm not sure if I can include that, because I don't know quite what the whole study shows.
Q. Let me -- let me ask you if you'll listen real carefully to my question. I'm not asking you if there was a resolution of the issue. All I'm asking you is if you will agree that there was an awareness of compensatory smoking behavior; was there an awareness of that phenomenon within the public health community since, at least, the early-1960s?

A. Okay. And I can't testify to that.
Q. You cannot testify?
A. No. As I said, I can testify to the period of

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about '80s. There was an awareness in the '80s. In the '70s and '60s, there may have been these isolated studies; I do not know.

Q. Okay. So you just don't have an opinion one way or the other --

A. I don't have an opinion.

Q. Just to be clear, for the record, you don't have an opinion, one way or the other, for the period of time prior to the 1980s; is that correct?

A. Correct.

Q. Okay. Let me ask you now about the FTC, about the awareness of the FTC and the FTC staff. Would you agree that the FTC, or the FTC staff, had an awareness of compensatory smoking behavior, awareness of that phenomenon, since at least as early as the 1960s?

A. Well, I would hate to say what was in their mind, since I was not there. I can tell you that in 1983, when I took over the tobacco program, and the Benowitz study was published, and Brown and Williamson came in with its defense to the Barclay matter with the condemnation of the entire system based upon compensatory smoking of others. We were quite surprised. We knew that there was

some issues, but I don't think the awareness of.

But, again, I wasn't there. I can only testify to what we thought from 1983 on.

Q. Okay. Let me ask you this, do you have any reason to dispute, sitting here today, that the FTC, or the FTC staff, had knowledge of compensatory smoking behavior in the 1960s through 1983 when you got there?

A. I have no opinion.

Q. You have -- my question is, do you have any reason, sitting here today, to dispute that the FTC, or the FTC staff, was aware of the compensatory smoking phenomenon during that period of time before you began working on the issue?

A. Again, it depends what you mean by "compensatory smoking phenomenon." If you mean was the FTC aware from the beginning that smokers smoked different cigarettes differently than the machine, I think they were aware of that from the beginning.

If they were aware of the depths of the problems of compensatory smoking and the veracity of the system and the public health implications, I can't testify as to what was in their minds during the '60s and '70s. I can only tell you what happened during the '80s.

Q. Okay. Well, let me ask you this, do you have any reason to dispute, sitting here today, that the FTC,

or the FTC staff, was aware in the 1960s up until 1983, the period of time you've used, that some smokers smoked cigarettes in such a manner as to increase the yield of nicotine that they receive?

A. If what you're asking is were they aware from the very beginning of their tested procedure that smokers did not get the literal amount in the FTC method because each smoker might smoke differently, yes, they said publicly that they were aware of that.

MS. PARKER: Could you read that answer back, please?

(The Court Reporter read the answer on page

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564,
line 6 through line 20.)
BY MS. PARKER:
Q. I want you to please try to listen to my question.
A. Okay.
Q. Do you have any reason to dispute, sitting here today, that the FTC, or the FTC staff, was aware of a behavior that smokers engage in, whereby they smoke the cigarettes in such a way as to increase the amount of nicotine yield that they receive?
MR. PATRICK: Objection, time frame, and it's been answered.

THE DEPONENT: I'd have to say what I said before, which is that there are too many words in that that have meanings at different time frames in history. So I can only answer what I know they said publicly.
BY MS. PARKER:
Q. Okay. Could you hand me back the exhibits, those last few exhibits, please?
A. From 6 -- which ones?
Q. About the last five, I believe.
A. I'll give you all of them, I don't know. Here's the JNCI one.
(Tendered document.)
BY MS. PARKER:
Q. Do you have any reason to dispute that in 1968, the FTC was aware that the nicotine content of a puff of tobacco smoke is dependent on the way in which a cigarette is smoked?
A. Do I have any reason to dispute that?
Q. Yes.
A. I have no knowledge. If I looked at their -- if I looked at their publications regarding the testing procedure, I could be more specific, but you're asking me to recall wording.
Q. No, I'm asking you, sitting here today, do you

have any reason to dispute that information?
MR. PATRICK: I'm going to object to the way the question is framed, the term "dispute," but you can answer it, if you can.
THE DEPONENT: Well, I am having trouble answering the question, because I don't know whether they said tar and nicotine.
BY MS. PARKER:
Q. Let me ask you again --
A. Okay.
Q. -- if you could listen.
A. Okay.
Q. Do you have any reason to dispute, sitting here today, that the FTC had -- or the FTC staff had knowledge, back in 1968, that the nicotine content of a puff of tobacco smoke is dependent on the way in which a cigarette is smoked?
MR. PATRICK: Same objection.
THE DEPONENT: I don't have the information to be able to answer the question.
BY MS. PARKER:

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Studies http://industrydocuments.ucsf.edu/docs/ftfl0001

Q. So you can't dispute that?
A. In a --
Q. Do you have any reason to disagree that the FTC or the FTC staff --

A. I have no reason to agree or disagree.
Q. Do you have any reason to disagree that in 1968, the FTC, or the FTC staff, was aware that someone smoking a cigarette has, literally, fingertip control of how much nicotine he takes into his mouth by reducing the puff volume or inhaling less frequently, the smoker absorbs less nicotine?
MR. PATRICK: Objection.
THE DEPONENT: I don't know what they knew about absorption.

BY MS. PARKER:

Q. You don't know what they knew?
A. No, I don't know what they knew.
Q. Do you have any reason to disagree that in 1970, the FTC, or the FTC staff, was aware that smokers who smoked low nicotine cigarettes, attempted to compensate for the high-filter retention of nicotine by a faster puffing rate?
A. Do I dispute that they knew that?
Q. Do you have -- right -- do you have any reason to disagree that the FTC was aware of that information in 1970?
MR. PATRICK: Objection lack of foundation.
THE DEPONENT: I guess I would have been

surprised if they knew that, but I don't know.

BY MS. PARKER:

Q. You don't know?
A. I don't know, but I would be surprised if they knew that.
Q. Pardon?
A. I'd be surprised if they knew that, but they might have; I just don't know. I mean, talking about the velocity of smoking as a concept, I didn't learn about until recently, but I don't even know who was on the staff of the FTC in 1970, or whether they had a scientific committee. They had a scientific section in the -- I think the bureau of scientific inquiry; I don't know. I didn't even know who the commissioners were in 1970.
Q. I believe you said Matt Myers was a member of your committee on the tobacco product change --
A. Correct.
Q. -- is that correct?
Would you have any reason to dispute the accuracy of research conducted by Matt Myers?
A. I'd be surprised he conducted research.
Q. Would you have any reason to -- would you have any reason to disagree with any reports that he's written?
A. Well, that's very broad. If you're asking during the period he was at the Federal Trade Commission?

Q. Yes.
A. Okay. He published one report, that I know of -- the 1981 staff report on cigarette advertising -- I

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don't know the whole name. His report would have reflected the work of him and his committee, or his other staffers, would have gone through the political filters, and then would represent the views of the commission.

Q. That wasn't my question. My question was, do you have any reason to disagree with reports written by Mr. Myers when he was at the FTC?

MR. PATRICK: Objection, over-broad.

THE DEPONENT: Anything he wrote at the FTC? I couldn't say. You know, he was an honorable person; he was a federal employee. That was a good report. I don't know if every sentence in the report is accurate, but I know it was a good report.

BY MS. PARKER:

Q. Have you reviewed Mr. Myers 1981 report recently?

A. Not recently, no.

Q. When was the last time you reviewed it?

A. I probably looked at portions of it, back in 1984, when I was working on the tobacco rule at FDA, but I would not have read the entire thing since the early-'80s.

Actually, there were so many lawsuits during the '80s, I probably read it a couple times during the '80s.

Q. Would you agree that, at least as of 1979, there was evidence that some smokers who switched to low-tar cigarettes compensate for the reduced level of nicotine by a variety of methods. That increased their intake of tar and nicotine to levels substantially above those indicated by machine testing?

A. I would certainly agree that there were studies that showed that.

Q. As of -- as early as 1979?

A. I would have to check the dates of the studies to make sure. I don't know the dates of which -- I know by '81, when "The Changing Cigarette" was -- when the "The Changing Cigarette" report was published, they certainly detailed that.

The '81 report would have been developed in the '80s, so I can only assume that by '79 there would have been studies. I also know that in the '81 report, they did not come to a definitive conclusion. It was created -- created a concern, I guess, is the way to put it.

Q. Let me ask you, if you will, to look back at an exhibit that we marked on the fist first day of your deposition as Exhibit 6. And that's a Federal Register

dated 1983. Have you found that?

A. Oh, 6? That's 7.

Q. 6. It's probably going to be at the very bottom; is that it?

A. I've got 6.

Q. Do you have the Exhibit 6?

A. I do.

Q. All. Right let me bring your attention to page 15954, which is actually the second page of that article.

A. Correct.

Q. Middle column, the first full paragraph it begins "The commission wishes"; do you see that?

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A. Correct.
Q. The second sentence there, it says, "How much tar, nicotine, and carbon monoxide a particular cigarette delivers depends on the way it is smoked." Do you see that?
A. Yes.
Q. And in your trial brief that you filed in the Barclay case here --
A. Yes.
Q. -- and this is one that has your name on it --
A. Right.
Q. -- that you've already testified that you have worked on, you stated that "The FTC ratings provide

meaningful information to smokers who want to reduce tar intake and are willing to avoid compensatory behavior." Do you remember that language?
A. It's what we believed at the time. It was what we believed at the beginning of the trial.
Q. And in 1983, the District Court, the Federal District Court, agreed with the FTC, that the FTC method was valid and useful; isn't that correct?
A. Well, that's sort of an overstatement for what I thought he said. Let me find his decision.
Here you go. "The evidence, however, is not sufficient to lead the Court to hold that the FTC system is meaningless or deceptive."
Q. So you would agree that the Court found -- agreed with the FTC, that the FTC method was valid and useful?
MR. PATRICK: Objection.
THE DEPONENT: I think that what the Court -- we felt what the Court said, was that it was not totally worthless.
BY MS. PARKER:
Q. Well, when you were at the FTC, you fought to convince the District Court that the FTC method should be retained, correct?
A. That was not the purpose of going to the

District Court. The purpose of going to the District Court was to stop the deceptive advertising of Brown and Williamson's Barclay cigarette, which had taken greater license with the system than any other cigarette.
MS. PARKER: I move to strike that response.
BY MS. PARKER:
Q. My question is, when you were a lawyer at the FTC, when you put your name on that brief and those pleadings that were filed in District Court, you fought to retain the FTC method as a valid and useful testing method; isn't that correct?
A. The purpose of the lawsuit -- I can't answer the question the way you've asked it. I mean, the purpose of the lawsuit was not to get a Court decision that the FTC method was valid.
Q. I haven't asked you what the purpose of the lawsuit was. I asked you about your actions and what you did, okay?
My question is, when you were there as a lawyer for the FTC, signing those pleadings, putting your name on

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that brief, isn't it correct that at least one of the things that you were doing for the FTC was trying to retain the FTC testing method as a valid and useful testing method; isn't that true?

A. The word "retained," that was not the commission's intention. The commission's intention was to challenge Barclay's use of the methodology.

You know, the one thing that we said to the Court and the Court said to us was that we did not have a legal basis for the methodology. We thought it was a very useful consumer tool at the time.

Fought to retain it? You know, we, at the same time, put out a Federal Register notice in which we asked, Is there anything we can do about it to fix the problems? So I don't know what you mean by "fought to retain." Fought to retain says to me that we liked it the way it was and wanted it to stay and wanted the Court to say, yeah, this is a great procedure.

Q. Well, when you were at the FTC, when you were a lawyer there at the FTC, you went to the Court, you went to the District Court, and you told the District Court that the FTC testing method was a -- your words -- "very useful consumer tool"; is that correct?

A. That was certainly what we believed at the time. It had flaws, but we thought that consumers could get some use out of it.

Q. And you fought for it to be used by the FTC; isn't that correct?

MR. PATRICK: Objection.

THE DEPONENT: We litigated the case.

BY MS. PARKER:

Q. And isn't that your position, that you litigated as the lawyer for the FTC?

A. At that time, absolutely; we believed that the test had some utility for consumers.

Q. Now, back in 1983, the FTC requested comments about possible changes to the FTC test method because of compensation; isn't that correct?

A. Correct. I think it was '83. I know that we -- we had several Federal Register notices at that time, yes.

Q. And you're looking at Exhibit 6, correct?

A. Correct.

Q. Okay. And, specifically, the FTC requested an answer to some questions.

A. Correct.

Q. They're listed over on the third page of this document. If you look at paragraph number 7, "Should the commission further examine the implications for its testing program of the issues raised by compensatory smoking behavior, including hole blocking, when consumers smoke lower tar cigarettes"; that's one of the questions the FTC requested comments on, correct?

A. Correct.

Q. And then down further in that paragraph, "Are

there problems regarding compensatory smoking behavior which are significant enough to warrant further exploration of the changes in the method beyond those

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necessitated by the commission's findings concerning Barclay." And that was another question that the FTC sought comments on, right?
A. Correct.
Q. And you were the person listed on the first page of that document as the contact person at the FTC for this, correct?
A. Correct.
Q. So wouldn't you agree that, at least in 1983, the FTC was clearly aware of the possibility of compensation?
A. Yes.
Q. Let me ask you to look now at Exhibit 8 that was marked previously, and that's the Scarborough Conference, an article that had appeared in The Lancet?
A. Which number is that?
Q. Exhibit Number 8.
A. Okay.
Q. Now, wouldn't you agree that in 1983, at the Scarborough conference, which you attended, the issue of compensation was discussed?
A. And hotly debated, yes.

Q. It was discussed, correct?
A. Discussed, yes.
Q. And, in fact, the conference concluded, if you'll look on page 3, at the right-hand column, very last sentence on the page, "The conference concluded that government should make smokers more aware of the reality and potential risk of compensatory smoking"; isn't that correct?
A. When you say "the conference concluded," that was -- that was a consensus, not everyone agreed, but that was the consensus at that time, yes.
MR. PATRICK: I think this was 1985.
THE DEPONENT: No the article was published in '85. The conference was in '83, directly after the Barclay litigation.
BY MS. PARKER:
Q. But the FTC never did make any effort to make smokers more aware of the reality and potential risk of compensatory smoking; did it?
A. Again, I stand by my answer I made on the first day which is that I recommended that they do it; I prepared materials that they did it -- that they do it; they didn't do it.
Q. Wouldn't you agree that awareness of compensatory smoking behavior has even been noted in the

popular press?
A. I wouldn't agree, but --
Q. You would not agree?
A. I said -- I -- no, if you show me...
Q. Well, do you have any knowledge about whether or not compensatory smoking behavior has been noted and discussed in the popular press?
A. During what period?
Q. At any point in time.
A. Ever?
Q. Yes. I'm asking you, do you have knowledge --
A. I'm sure at some point in time, it must have

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been. When? I don't know.
(DFT. EXH. 77, Article "The ultra-low-tar gimmick," was marked for identification.)
BY MS. PARKER:
Q. All right. Let me show you what we have now marked as Exhibit 77. This is an article from Consumer Reports from January of 1983. If you look at the very first page there, on the right-hand column -- and by the way, the name of this is, "The ultra-low-tar gimmick"; isn't that correct?
A. Correct.
Q. Okay. Look on the right-hand column, second

paragraph, it says, "Smokers have also found another way to get more tar and nicotine out of an ultra low-tar cigarette. They change the way they smoke, a phenomenon called compensation."
A. I'm sorry; where? Okay, found it.
Q. Okay. Have you seen this article or that statement before today?
A. Yes, I did.
Q. Yes, you have?
A. Absolutely.
Q. You've seen this Consumer Reports article?
A. Yes.
Q. Okay.
(DFT. EXH. 78, Report of Hearings Before the Subcommittee on Transportation, Tourism, and Hazardous Materials, was marked for identification.)
BY MS. PARKER:
Q. Let me show you now what we've marked as Exhibit 78. These are hearings, a hearing transcript of a hearing before the house subcommittee that was considering the issue of requiring the FTC to continue to study the constituents of smoke, and it's dated 1988, correct?
A. Yeah, it seems to be over three days in '88.

Q. Do you agree that the FTC was told again, in 1988, about compensation behavior at this hearing that was held?
A. The committee was told?
Q. Right. The committee had a presence there. The committee was aware at this hearing --
A. There was testimony before this committee on compensation. The public health community was very confused, by 1988, about what it wanted.
On the one hand, it thought that the test methodology produced real problems. On the other hand, they wanted the FTC to continue testing. It was a very mixed message that we got from them.
Q. Well, from these hearings in 1988, the FTC, and others, were provided information on compensation by Mr. Munzer of the Coalition on Smoking or Health; is that correct?
A. You know, I would dispute how much the public knows about what's going on on Capitol Hill.
Q. I'm asking about the FTC.
A. Was the FTC -- I'm not sure the FTC was in the

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room at the time Mr. Munzer -- as a protocol.
Q. Now, I'm not asking you if you were present in the room.
A. Okay.

Q. I'm asking if the FTC had knowledge of the substance of the testimony that was given -- I'm going to ask you, first, about the Coalition on Smoking or Health at these 1988 hearings?
A. We probably read their testimony; I would suspect that we did, yes.
Q. So you would agree that the FTC was provided information, through this testimony, on compensation by Mr. Munzer of the Coalition on Smoking or Health?
MR. PATRICK: Objection.
THE DEPONENT: Okay. When you say "the FTC," do you mean the commissioners or the staff.
BY MS. PARKER:
Q. I mean the FTC or the staff; FTC, FTC commissioners, or the staff.
A. Okay. The sentence you said was, was the commission provided. The commission wasn't provided; a staff member would have read it.
Whether the commissioners themselves were aware of it, it would have had to have been brought to their attention, probably by one of their staff or by the staff of the Division of Advertising Practices.
The chairman of the Federal Trade Commission, who would have testified at that time, clearly would not have been in the room during this testimony; that's

protocol.
Q. Will you agree that the FTC staff was aware of the information that was provided through this testimony on the issue of compensation, first of all, by Mr. Munzer of the Coalition on Smoking or Health?
A. I think I can testify to the fact that I probably read it.
Q. You did?
A. Yes --
Q. You personally read it?
A. -- and I was a member of the staff.
Q. Okay. Were you also aware of the information on compensation that was provided by Mr. McAfee of the AMA?
A. If he -- let's see, I probably read it. I probably read it. I can't swear to it, but I probably did.
Q. And were you -- were you aware, or anyone else in the FTC staff aware, of the information provided on compensatory smoking through this hearing by the Oak Ridge National Laboratory?
A. First, I want to go back and tell you that the staff of the FTC in those days was very small, so if it wasn't me, the chances of it being anybody else are very slim. I mean, the FTC would have had about one staff person, at best, devoted.

So, now, was I -- I probably -- the testimony was by Mike Guerin?
Q. Yes.

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A. I probably would have read what Mike wrote.
Q. Okay. Do you agree that, at least by 1983, the FTC knew that when people smoke, they can alter the deliveries of cigarettes by changing the way the cigarette is smoked?
A. Yes, the staff certainly was.
Q. And, again, at least by 1983, the FTC knew that smokers can adjust the amount of smoke which exits the cigarette by changing the way they smoke and by altering the cigarette?
A. By changing the way they smoke, yes. Now, you said "by altering"?
Q. By altering the cigarette.
A. We knew some of the ways; we didn't know all of the ways.
Q. Isn't it true that each smoker exhibits his or her own individual smoking behavior which can change from cigarette to cigarette and even from puff to puff?
A. In general, I guess we would agree with that, yeah.
Q. And wouldn't it be incorrect to state that smokers will receive the same levels of tar and nicotine,

irrespective of what type of cigarette they smoke?
A. Could you repeat that again?
Q. Sure, I'll be glad to. Wouldn't it be incorrect to state that smokers will receive the same levels of tar and nicotine, irrespective of what type of cigarette they smoke?
A. They certainly can receive the same level.
Q. But wouldn't it be incorrect to make that blanket statement?
A. All smokers at all times will receive the same level? All smokers at all times will not receive the same level.
Q. So the statement that -- so this statement is incorrect, that smokers will receive the same levels of tar and nicotine, irrespective of what type of cigarette they smoke; that statement is incorrect?
A. If you mean all smokers at all times, sure.
Q. And do you also agree that there is no way to accurately measure the extent to which smokers engage in compensatory behavior, because each smoker smokes differently?
A. There's no way to measure that? I think there is. From what I've heard, the industry has done some modeling.
Q. Well, if you could listen to my question again,

please?
A. Okay.
Q. Wouldn't you agree that there is no way to accurately measure the extent to which smokers engage in compensatory behavior because each smoker smokes differently?
MR. PATRICK: I'm going to object.
Asked and answered.
THE DEPONENT: I'm having trouble with the sentence. If you're saying could you figure out how each smoker smokes? The answer is yes. The answer (sic) is could you model that behavior?

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Yes.

The first part of your sentence talked about one person, and the second went to population. So are you talking about individual or population?

BY MS. PARKER:

Q. Let me ask you first about individuals.

A. Okay.

Q. And then I'll ask you about population.

A. Okay.

Q. Okay?

A. Okay.

Q. Can you answer the question with respect to an individual smoker?

A. Could you repeat the sentence, then, for an individual?

Q. All right. There is no way to accurately measure the extent to which an individual smoker engages in compensatory behavior, because each smoker smokes differently?

A. Well, okay, and that's each smoker -- no, I don't agree with that. I think you can figure out how an individual smoker smokes. I can't test it myself, personally, but I've read reports that the industry can test.

I think that the American Health Foundation, Mirjana -- I can't remember her last name -- did some modeling of individual smokers, so I think you probably can get a pretty accurate idea of how an individual compensates, not all of the compensations, some of it is -- some of it may be difficult.

Q. Let me ask you this question, do you agree or disagree there is no way to accurately measure the extent to which smokers, as a general population -- smokers engage in compensatory behavior, because each smoker smokes differently?

A. If you're asking -- there are so many variables that it would be hard to come up with.

Q. I'm asking the question that I stated.

A. I know. I can't answer it. I have trouble understanding what the question is asking.

I mean, I can answer the question about an individual. I can tell you the FTC method doesn't tell you what smokers get. But I can't answer the question you're asking, because I don't understand it.

Q. Okay. Do you agree or disagree that there is no way to accurately measure the extent to which all smokers who smoke engage in compensatory behavior?

MR. PATRICK: Objection.

THE DEPONENT: You know, with an infinite amount of money, yeah, you could figure out anything. So I can't agree with a broad statement that says there is no way, no how.

BY MS. PARKER:

Q. What are the industry reports that you referenced a moment ago?

A. What are the industry reports? I have not read the industry reports. I've talked to people who have said they have seen things that talk about how the industry can look at -- I know that during the Barclay trial we saw

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things that Phillip Morris and Reynolds did with puff volume and velocity and filter ventilation and pressure drops, and things like that. So those are the ones I'm most familiar with, the one I saw during Barclay. The

rest of them, only reports of.

Q. Pardon me?

A. The rest of them I heard reports of. You didn't ask me do I, of my own certain knowledge, you asked me could I agree or disagree with a very broad statement. And because of things that I've heard, I can't agree, because I don't understand the question of -- as precluding the possibility that such a thing can happen.

Q. Can you identify any of those industry reports with any more specificity?

A. No.

Q. Is there a way to measure the extent to which any one smoker engages in compensatory behavior?

A. I would assume so.

Q. Okay. What is that way?

A. You didn't -- you asked me is there any one way. You know, I don't know. I would have to look at -- I know that the American Health Foundation certainly looked at depth of inhalation, puff frequency, puff volume, hole blocking, speed. I didn't look at -- I didn't read their article carefully enough to know what kind of machine they used.

Q. Do you have any knowledge, other than this one article you've read?

A. And talking with people.

Q. Tell me what you've learned from talking with people.

A. I have learned that there are ways of measuring these things. This is not my area of expertise.

Q. Compensatory smoking behavior is not --

A. No.

Q. -- your area of expertise?

A. The testing, the testing of it.

Q. The testing of compensatory smoking behavior is not one of your areas of expertise?

A. No.

Q. Is that correct?

A. If talking about how machines work and how they're designed and -- no, that's not -- I'm not a machine technology person.

MR. PATRICK: Stephanie, we've been going about another hour and 15 minutes; it's about a quarter after. Do you want to break for lunch at this point?

MS. PARKER: Can you give me a second?

If we could go on until about 12:30, I think I would be at a really good breaking point. If you really want to stop now, that's fine.

MR. PATRICK: What do you want?

THE DEPONENT: I assume finish this line, but

no later than 12:30, please.

MS. PARKER: All right.

BY MS. PARKER:

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Q. Have you ever reviewed a study called "Cigarette Smoking: The Study of Certain Aspects of Human Smoking Habits" from 1957?
A. I have no idea.
Q. Have you ever read a study called "Cigarette Smoke Condensate Preparation and Routine Laboratory Estimation"?
A. Who are the authors?
Q. From 1959?
A. Who are the authors?
Q. Bentley and Bergen.
A. I -- you know, off the top of my head, I don't think so.
Q. Have you ever read a chapter called "The Effect of Experimental Conditions on Smoking Behavior" --
A. Who --
Q. -- in 1978?
A. Who wrote that?
Q. Comber and Crayton?
A. You know, the later in time it gets, the more possibility there was that I might have read it, but --
Q. Well, do you know whether you've read it?

A. You know, for the Barclay trial, I read this amount of studies in getting prepared. (Indicating)
I might have read it; I don't know.
Q. Have you ever seen studies or data about the extent to which smokers compensate when smoking low-yield tar and nicotine cigarettes?
A. Have I read any studies on that?
Q. Yes.
A. Absolutely.
Q. What studies?
A. Do I get to pick from a list, or am I supposed to remember?
Q. I want you to tell me all the studies that you have reviewed on that issue.
A. I don't think I could do that from memory.
Q. Is this another area where you're not an expert; in particular, the extent to which smokers compensate when smoking low-yield tar and nicotine cigarettes?
MR. PATRICK: Objection.
THE DEPONENT: You mean have I conducted studies? I've conducted no studies of my own. I probably have read over several hundred articles.
BY MS. PARKER:
Q. I'm just asking you if that is or is not one of the areas you claim to be an expert on?

A. My area of expertise is regulation of tobacco products and it included the review of these kinds of pieces of information. I am not a scientist.
Q. Are you -- if you could help me out here, are you or are you not claiming to be an expert on the area of the extent to which smokers compensate when smoking low-yield tar and nicotine cigarettes?
A. Claiming to have expertise in the area of Federal Trade Commission and Food and Drug Administration regulation, based upon that information. So I am not expert in the sense that I have done no studies.
Q. Wouldn't you agree that it would be misleading

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to try to estimate the extent to which smokers, as a population, engage in compensatory behavior?
A. Be misleading?
Q. Uh-huh.
A. To whom?
Q. To anyone who would read the study.
A. That it would be --
Q. Misleading to try to estimate the extent to which smokers, as a population, engage in compensatory behavior; wouldn't that be misleading to try to do that?
A. You could do a population study and say in this particular population study, this amount of -- this is the yields that the people got, these are the yields that the

FTC method said they should have gotten, and therefore this percentage of -- this percentage difference occurred.
Q. Wouldn't it be misleading to use a population study, like the one you just referenced, in order to try to estimate the extent to which smokers, all smokers as a population, engage in compensatory behavior?
MR. PATRICK: Objection.
THE DEPONENT: Studies aren't misleading. Studies give information that you can use. If a study -- if a study sought to quantify, on a population basis, the compensation that occurred in a group that was being studied, that's not misleading; that's a piece of information.
MS. PARKER:
Q. That's a piece of information for that group that's being studied. My question is, if you used the information that you got from that group that's being studied, and if you tried to use that information to estimate the extent to which all smokers, as a population, engage in compensatory behavior, that effort would be misleading; don't you agree?
A. I can't agree or disagree. I mean, I have --
Q. You just don't know?
A. Well, it's not that I don't know; I don't understand the question.

Q. What about my question don't you understand, and I'll try to rephrase it?
A. Okay. Is your question, if the Federal Government had one study, and sought on the basis of one study, to make a regulation; would that be misleading?
Q. That's not my question.
A. Okay.
Q. I'm not asking you about regulation --
A. Okay.
Q. -- right now. ?
I'm asking you about using the results of one population study, that you've referenced, and using the results of that one study to try to estimate the compensatory -- the extent of compensatory smoking for the entire smoking population?
A. It might be, and it might not be. It would depend on, you know, was it a -- was it a representative sample of the United States of America? What kind of -- there's too many qualifiers to be able to say yes or no.
(DFT. EXH. 79, Article "The Health Consequences of Smoking, The Changing

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Cigarette," a report of the Surgeon
General, was marked for identification.)
BY MS. PARKER:
Q. Let me show you now what we've marked as Exhibit

79. And this is a part of the 1981 Surgeon General's Report, and I want to bring your attention to page 86, which is the second page of the report. The first full paragraph on that page, I want to ask you about the last sentence which begins "On the other hand"; do you see that?
A. Uh-huh.
Q. Do you see that?
A. Yes I do.
Q. Okay. It states, "On the other hand, the lower tar and nicotine cigarettes of 1980 have as little as one-fourth the tar and nicotine of the cigarettes of 1950. And even if some compensation takes place, actual net smoker exposure is probably much lower." Did I read that correctly?
A. You read that correctly, I --
Q. Have you seen this portion of the 1981 Surgeon General's Report prior to today?
A. Yeah, but not recently.
Q. And do you agree that this same finding, that we just went over in the Surgeon General's Report, was also noted by Mr. Kalfey (ph) in 1985; do you recall that?
A. No, I don't recall that. And I wouldn't write the sentence this way today, nor would the Office on Smoking and Health.

MS. PARKER: I move to strike that
comment.
BY MS. PARKER:
Q. Are you familiar with Dr. Neal Benowitz?
A. Yes.
Q. I believe you said yes.
A. Right.
(DFT. EXH. 80, Clinical Investigation,
"Reduced Tar, Nicotine, and Carbon
Monoxide Exposure While Smoking
Ultralow- But Not Low-Yield Cigarettes",
was marked for identification.)
BY MS. PARKER:
Q. Let me show you now what we've marked as Exhibit 80, and that's a study by Dr. Benowitz and others from 1986, that was published in the Journal of the American Medical Association, correct?
A. Okay.
Q. Is that correct?
A. That -- I'm sorry?
Q. That this is a study published by Dr. Neal Benowitz and others in the Journal of the American Medical Association in 1986?
A. Yes.
Q. And the title of the study is "Reduced Tar,

Nicotine, and Carbon Monoxide Exposure While Smoking Ultra-low, but Not Low-yield Cigarettes"; correct?
A. Correct; uh-huh.

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Q. And if you look at the first page in the summary there, about midway in the summary, "The study found that tar and nicotine exposures were reduced by 49 percent and 56 percent while smoking ultra low-yield cigarettes," correct?
A. Correct.
Q. Okay. Now, smokers do not continuously exhibit the same pattern and level of compensatory smoking behavior after they switch to a low-yield tar and nicotine cigarette, correct?
A. Smokers?
Q. Smokers do not continuously exhibit the same pattern and the same level of compensatory smoking behavior after they switch to low-yield tar and nicotine cigarettes; do they?
A. Given that every smoker changes how they smoke each cigarette and even within the cigarette, yes.
Q. So in other words, compensation is not complete, correct?
A. Compensation can't be complete or incomplete. By "compensation," do you mean -- compensation isn't complete? There's nothing complete or incomplete about

compensation. Compensation is the way you change your smoking behavior.
If by "compensation," you mean getting back to the same level as you started with your old cigarette, you may or may not.
Q. Smokers gradually adjust to the lower levels of tar and nicotine over time after they switch to a lower yield tar and nicotine cigarette, correct?
A. I've seen studies that have had both, you know, it depends on whether it's a forced crossover study, whether it's ad lib smoking, whether you look at the length of time. And I haven't looked at studies recently, so I don't know what the newer studies have found.
Q. Okay. Would you agree that all things being equal, a smoker who smokes a higher-rated tar and nicotine brand cigarette is likely to receive relatively more tar and nicotine, than a smoker who smokes a lower-rated tar and nicotine brand?
A. Yes, and no. Some do, some don't.
Q. Would you agree that, in general, smokers who smoke a higher-rated tar and nicotine cigarette brand receive more tar and nicotine than smokers who smoke a lower-rated tar and nicotine cigarette?
A. You know, among the various studies that Benowitz did, some show that -- the scatter chart was

almost identical for low and high, that you could have people on the high-end get as much as people on the low-end, and vice versa.
Some of the studies, when you plotted the line, showed a slight, very slight increase from low to high. So maybe yes, maybe no.
Q. You just don't know?
A. Well, no, I'm telling you what I -- how I read what the studies said. And the way the studies read is that there may be, for some smoker's, at the high-end -- there must be some, because it's a short but progressing line between low-to-high on the FTC scale. So --

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Q. I didn't understand your answer at all.
A. Okay.
Q. Let me ask my question again. If you'd try real hard to listen to this.
Okay. All things being equal, would you agree, as a general matter, whether or not there are exceptions, I'm not asking you about, but as a general matter, that smokers who smoke a higher-rated tar and nicotine yield cigarette receive more tar and nicotine than smokers who smoke a lower-rated tar and nicotine brand?
A. I couldn't agree with that, because that talks about what smokers get. And what I'm saying is that studies that I've seen that indicate that, on population

basis, if you look at some groups of smokers, there is a -- the group at the high-end, if you averaged them out, get a little bit more than the group at the low-end, but that there is many at the high-end and the low-end that get the same amount.
Q. Well, a smoker who smokes a lower-rated tar and nicotine yield cigarette, again all things being equal, would be likely to receive less tar and nicotine than a smoker who smokes a higher-rated brand?
A. Again, by looking at one smoker and saying does the smoker receive less? I can't say yes, because individuals can get what they want from the product. If you're asking on a population basis, if you look at an entire group of people as a population, that population at the very bottom can receive less.
Q. Do you agree that some smokers may, in fact, actually receive higher smoke yields than the FTC method would predict?
A. Yes.
Q. And you would agree that other smokers, in fact, will receive the predicted yield?
A. Statistically, that probably has to be true.
Q. And still, others will receive lower yields; is that correct?
A. Certainly, people who don't inhale are going to

get a lot less, or the people who let the cigarette sit in the -- or don't inhale deeply or -- yeah.
Q. Well, here's my question, do you agree that some smokers may, in fact, receive lower smoke yields than the FTC method would predict?
MR. PATRICK: That's been asked and answered, I object.
THE DEPONENT: It's possible.
BY MS. PARKER:
Q. I'm sorry?
A. Yes, it's possible.
MS. PARKER: Let's break for lunch now.
VIDEOGRAPHER: Off the record at 12:30.
(A luncheon recess transpired.)
VIDEOGRAPHER: Back on the record at approximately 1:46.
(DFT. EXH. 81, Federal Trade Commission vs. Brown & Williamson Tobacco Corporation, Order and Judgment, was marked for identification.)
BY MS. PARKER:

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Q. Mrs. Wilkenfeld, let me show you what we have marked as Exhibit 81. That's the Order from the District Court that you were referencing this morning that you said you wished you could have a copy of to look at.

A. Uh-huh.

Q. All right. I want you to look at this Order; take your time and review it, and then I'm going to ask you if you agree that there is nothing at all in this Order and judgment, that's dated 1983, that in any way would address the tar and nicotine numbers of cigarettes other than the Barclay brand for B&W?

A. The Federal Trade Commission would have acted pursuant -- well, based upon paragraph 2 under the Order which says, "Defendant shall not be required to advertise any milligram tar yield for Barclay cigarettes under the present Federal Trade Commission --

COURT REPORTER: I'm sorry; could you read slower for me?

THE DEPONENT: "And Defendant shall not be required to advertise any milligram tar yield for Barclay cigarettes under the present Federal Trade Commission approved voluntary rating program now in effect."

We took that, and the statements of the judge, during the trial to indicate that the commission had no authority to require the use of the numbers, but that we did have the right to say that if the numbers we used, that they should be comparable.

BY MS. PARKER:

Q. Okay. You're referring to some language here on paragraph 2 on page 2 of the Order; is that correct?

A. Yes.

Q. Did I understand you correctly to say you're also -- also relying on statements by the judge during the trial?

A. Well, you asked me, would the commission sue a company for leaving the numbers out. And I said, I doubted it seriously or no or something to that effect. And you asked me what I based it on. I based it on this in the Order, statements that Gerhardt Gasell made, so you asked me what it is, that's where it comes from.

Q. What statements by the judge are you relying on?

A. You mean during the trial?

Q. Well, I'm asking you. You said you're relying on statements by the judge; I'm asking you to please identify those statements.

A. I don't have -- I don't have a transcript of the hearing of the trial. You know, it's been 17 years.

If you're asking me does my memory fail? Sure. But I'm telling you, based upon what happened during that trial, the Order that was issued, discussions with the people at the Federal Trade Commission, it was clear to me that the Federal Trade Commission would not sue a company

for leaving the numbers out.

Q. Was that view ever discussed within the FTC?

A. We certainly discussed the status of the tar and

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nicotine testing program following the Barclay matter, what it is we could and couldn't do.

Q. Who participated in those discussions?

A. Again, from 17 years hindsight, I would have to say, I would assume Wally Snyder, who was the associate director of the Division of Advertising Practices, Joel Winston, Mel Orleans, Jerry Cummings, might have been other people in the General Counsel's office, might have been people in the Bureau Director's office at that time. Let's see who would have been bureau director by then. I'm not sure who was bureau director at the time we were having those discussions with the bureau. This would have been something we would have discussed in my division.

Q. Who at the FTC made the decision that the FTC, according to your testimony, would not challenge any ads that failed to disclose the tar and nicotine rating numbers?

A. You know, if I said at any time the FTC would not, as opposed to I believe the FTC would not, then I misspoke. But if you're asking do I believe the -- I could have sworn I was asked what -- did I believe the FTC would challenge an ad that didn't have numbers, and I

said, no, I don't think they would. That's based upon my judgment, as having been there from 1983 to 1994, and everything that occurred during that period and everything I've seen since then.

Q. Well, to be clear, is it your testimony that the FTC, or the staff of the FTC, made a decision that the FTC would not challenge any ads that failed to disclose the tar and nicotine rating numbers?

A. What do you mean by "decision"; something in writing, something legally binding, something we discussed?

Q. Ms. Wilkenfeld, don't you have an understanding of the word "decision"?

A. I have many understandings of the word "decision." If you're asking if I talked with Joel Winston and Wally Snyder and we decided, boy, in the future, if this happens, we sure wouldn't want to challenge it; that probably occurred.

If you're asking me did I make a recommendation to the bureau director and the bureau director signed off on it and sent that recommendation to the commission, the answer would be no. If you're asking me if we published anything, the answer would be no.

So depending upon whether you're talking about a decision-making process in the minds of people or a formal

action on the part of the commission, my answer would differ.

Q. Well, did you, personally, ever communicate to any tobacco company the fact that, in your opinion, the FTC would not challenge any ads that failed to disclose the tar and nicotine rating numbers?

A. Did I ever say in any conversation, at any time, to anybody representing a tobacco company --

Q. No, my question was broader than that. I said, did you ever communicate?

A. Okay. Did I ever communicate, which I take to mean in a conversation, at any time, to any person

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representing the tobacco industry, that they didn't have to have a number in an ad? I would suspect I did.

Q. Do you recall who you had those --

A. No.

Q. -- communications with?

A. No, but it was -- if we were discussing -- if it would come up in discussion, it would certainly have been something I would have said. You know, I had a thousand discussions. It is not a formal position of the commission.

Q. Is it a position of anyone who is on the FTC staff other than yourself?

A. At the moment or at that time?

Q. At that time.

A. Yes.

Q. Who else held your view?

A. Wally Snyder, Jerry Cummings, Mel Orleans, Joel Winston. We communicated it higher, probably anybody we told. It was certainly what we felt was the outcome.

Q. Let me show you now what we have marked as Exhibit 82.

(DFT. EXH. 82, Federal Register, Vol. 42, No. 79, was marked for identification.)

BY MS. PARKER:

Q. Okay. Exhibit 82 is a Federal Register from April 25th, 1977; is that correct?

A. Yes.

Q. All right. And that Federal Register indicates that the FTC solicited additional information in 1977 on its testing methodology, correct?

A. Yes.

Q. Pardon?

A. I'm sorry; what was the question? I think I'd like to read it, if I may.

Q. Please take your time.

A. Okay.

Q. In 1977, didn't the FTC solicit additional

information on its testing methodology?

A. You know, I can't tell from this. It -- the commission says that additional information would be important, but this is not the form of a Federal Register notice that we would have published in the '80s if we were soliciting comments. So I can't really tell what it is they were doing here.

They raised a question, but they gave no information about how to file that if you had anything to say. I don't know whether this was just an inquiry. I'm afraid I really can't tell you what they were up to.

Q. Well, at a minimum, wouldn't you agree that in 1977, the FTC stated that additional information on its testing methodology was necessary before it could decide whether further action should be taken in connection with that matter?

A. Well, apparently, Lorillard wanted to know whether they could change the insertion depth, and the FTC seemed to indicate they didn't have enough information.

Q. And it's correct that ventilated filters was a specific issue that led the FTC to issue this Federal

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Register asking or stating that it needed additional information on its testing method?

A. They -- it sounded to -- well, from what I can gather from this, they could be asked to retest by a

company at any time. They might or might not exceed (sic) to that request.

I don't know whether this request was based upon a desire by Lorillard to see if its numbers changed. I know there was a concern in the beginning about depth insertion. Clearly, they mention ventilation holes here. That's as far as I can go, is what it says here.

Q. Okay. Let me repeat my question.

A. Okay.

Q. Don't you agree that ventilated filters was a specific issue that led the FTC to issue this document that's been marked as Exhibit 82?

A. I can't agree to that. I don't know whether this was issued as a result of a request from Lorillard strictly as an answer to Lorillard, or whether this was -- it does not appear to be a more general statement by the commission. It appears to be in response to a specific question raised by Lorillard.

Q. Let me bring your attention to the column that's on the left-hand side, the last full paragraph in that column, the second sentence there says, "Recent developments in ventilated filtration systems have raised the question." Do you see that?

A. Yes, I do.

Q. Okay. My question to you is, do you agree that

ventilated filtration systems was a specific issue that the FTC was investigating, was reviewing here?

A. No, I would probably disagree with that, because what it says is, "As a result of a request from Lorillard, the FTC conducted two re-tests" they accepted one, they rejected another, and this is their explanation. So if I had to guess what this was, I would guess that this a publication of an answer to Lorillard based upon their request for a new test.

Q. You're not an expert in the area of cigarette filter design; is that correct?

A. I'm not an expert in the area of filter design. No, I know a lot about cigarette filter designs related to the one case that I brought against Brown and Williamson, but I used an expert.

Q. Okay. And you're also not an expert on the broader area of cigarette design, correct?

A. No.

Q. Now, after this 1977 Federal Register that we marked as Exhibit 82, the FTC did not change its testing method, correct?

A. When I started the Barclay investigation, I looked at historical documents at the commission, and I did not see evidence that any action took place as a result of this.

Q. So you would agree that the FTC did not change its testing method subsequent to this 1977 Federal Register document that we've marked as Exhibit 82; is that

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correct?
A. I'm pretty sure they did not change their insertion depth. I want to check that before I would be held to a totally definitive statement.
(DFT. EXH. 83, Federal Register, Vol. 43, No. 56, was marked for identification.)
BY MS. PARKER:
Q. Let me show you now what we've marked as Exhibit 83, and that's another Federal Register --
A. Okay.
Q. -- this time dated from 1978, correct?
A. Yep.
Q. Just let me know after you've had a chance to review the document.
A. Okay.
I think that that shows we certainly didn't know what was going on.
Q. Pardon me?
A. I said I think that shows we didn't know what was going on, in '78.
Q. In 1978, didn't the FTC determine that cigarette

filters did not invalidate the tar and nicotine numbers?
A. You know, I just read this all, and the commission was clearly not -- was clearly not addressing the issues of compensation so much as cigarette design. I mean, Harold Pillsbury talked about, which Harold would have, talked about the reason it's at 11 millimeters is that's because it's the best place to hold it, from the machine perspective.
So you were asking if this is a proof that the commission at that time thought that filters --
Q. My question is, didn't the FTC determine, in 1978, that cigarette filters did not invalidate tar and nicotine numbers?
A. I didn't read it that way, no.
Q. Let me ask you to look at page 1, middle column, the fourth paragraph, the one that begins "The point of this statement."
A. Uh-huh.
Q. It says, "The point of this statement was that the FTC's tar and nicotine values represented valid standards for making comparisons among different cigarettes." Do you see that statement?
A. Yes.
Q. So in 1978, the FTC, once again, expressed support for the FTC method, correct?

A. Well, there's the rest of that paragraph, "Thus, if the consumer smoked each different cigarette the same way, he would inhale tar and nicotine amounts proportionate to the relative value." That's a big if.
Q. Well, let me ask you to look again at that first sentence here. Okay. Let me read it one more time. "The point of this statement was that the FTC's tar and nicotine values represented valid standards for making comparisons among different cigarettes." And my question is simply this: Do you agree that, in 1978, the FTC, once again, expressed support for the FTC method by stating that the FTC's tar and nicotine values represented valid

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standards for making comparisons among cigarettes?
A. Okay. The statement that that sentence refers to is the one directly above it, which is a quote from the '67 statement. It just says that was the statement that it made and that was the purpose laid down by the test, and that -- I don't see that as a reaffirmation, I see that as a historical statement.
Q. It's a historical statement that the FTC's tar and nicotine values represented valid standards, correct?
A. In nineteen -- you read the sentence correctly. You're asking me to take from that sentence many more things than are said in that sentence, and I'm not willing to go beyond what the sentence says.

Q. Well, the sentence says what it says.
A. That's right.
Q. And you know Dr. Hoffmann, Dr. Dietrich Hoffmann?
A. Yes.
Q. Do you happen to know his opinions, back in 1980, regarding the possibility of changing the FTC's tar and nicotine ratings?
A. 1980?
Q. Yes.
A. No, I don't. The first time I spoke with Dietrich Hoffmann was in 1983.
Q. In 1983, did Dr. Hoffmann tell you his views or suggestions to change the FTC's tar and nicotine ratings?
A. In 1983, Dietrich Hoffmann was very angry with the Federal Trade Commission, so I did not -- I didn't get much in the way of opinions or methodology from him at that time.
Q. Well, at any point in time, have you ever heard --
A. Hum.
Q. Let me finish my question. Have you ever heard Dr. Hoffmann's views or suggestions to change the FTC's tar and nicotine ratings?
A. I read many things by him, and there was

something recently. I would have to look to see a specific article to know what he recommended at any given time. He is quite knowledgeable in this area.

(DFT. EXH. 84, 11/18/80 Memo to Dr. F.J. Schultz from V. Norman, was marked for identification.)

BY MS. PARKER:
Q. Let me show you what we've marked as Exhibit 84. This is a memorandum on Lorillard stationery dated 1980. All I want to do is bring your attention to the middle of the page there, it says, "Dr. Hoffmann considers these suggestions to change the FTC's tar and nicotine rating as, quote, stupid. Have you ever heard that before?
A. You know, this is a memorandum by a tobacco company person who said he visited the American Health Foundation and was reporting on what Dietrich Hoffmann may or may not have said. I don't -- I can't comment on this, one way or the other.
Q. Well, you can comment and let me know if you've ever heard this before. That's what my question is.
Before today, have you ever heard that

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Dr. Hoffmann considered suggestions to change the FTC's tar and nicotine ratings as, quote, stupid?
A. Let me see if that's what this says.
Well, I'm not sure he's saying that changing is

stupid. He certainly is saying that that suggestion, a continuous smoking and blocking all the ventilation pores, is stupid. And, no, I never heard this.
Q. Now, you came to the FTC in 1980, correct?
A. Yes.
Q. When you joined the FTC, you were already aware of the criticism of the FTC method with respect to possible compensation, correct?
A. Absolutely not.
Q. Absolutely not?
A. No.
Q. Okay. Did you learn information about the criticism of the FTC method with respect to possible compensation as part of your training when you got to the FTC?
A. No, I was not hired to work on tobacco.
Q. Okay. When you first started working on the tobacco issues, I believe that was 1983 --
A. Yes.
Q. -- is that correct?
When you first started working on the tobacco issues, is that when you received training about issues such as the criticism of the FTC method with respect to compensation?
A. I received no training.

Q. When did you first hear the criticisms of the FTC method with respect to possible compensation?
A. When I became a program advisor for tobacco advertising, the Barclay matter was already well into its process. It had finished the -- the commission had already issued its decision, they had already written a Federal Register notice. Brown and Williamson had gone to court in Louisville, gotten an injunction, the Federal Register was not published. And by the time I was hired, we were working on a recommendation of the commission to seek an injunction.
I would have started working with all of Brown and Williamson's positions, which were that compensatory smoking invalidated the system. So I would say that from the first day I started reading, I became aware of these things.
Q. And that was in 1983?
A. Yes.
Q. Okay. Back in the early-'80s, did you ever go to your boss and say, Hey, we need to change this FTC method because of the problem with compensation?
A. I was not involved in any way in the tobacco program prior to 1983. My responsibilities included children's advertising.
Q. Starting in 1983, starting in 1983, when you

were then assigned to work on tobacco issues --
A. Uh-huh.
Q. -- and you started reading about the criticisms

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of the FTC method with respect to possible compensation, did you ever go to your boss and say, Hey, look, we need to change the FTC test method here because we have a problem with compensatory smoking?

A. One of the first things I did was this Federal Register notice, which said we've got to do something about compensatory smoking. So that was, indeed, part of the discussion.

That decision had been made prior to my becoming involved with tobacco, was that compensatory smoking was a problem and that the commission needed to seek advice on how to take care of that.

Q. But the FTC never took any action to change its testing method because of compensatory smoking, correct?

A. In 1983, and, again, I'm not sure whether there were any in 1984, we issued press -- sorry, Federal Register notices asking for assistance in looking at this issue and coming up with ways and means to address it. Information was not forthcoming.

The commission was in a funny position with the testing methodology. Because it was voluntary, and they were not a signatory to it, they did not feel comfortable,

I guess, issuing a Subpoena to the company, so they required -- they relied on voluntary submissions from the industry. The industry did not respond voluntarily. They -- so the commission had no information on which to proceed.

MS. PARKER: I move to strike that response.

BY MS. PARKER:

Q. My question is only this: Don't you agree that the FTC did not take action to change its testing method because of the problems of compensatory smoking; isn't that correct?

A. They issued Federal Register notices which was its way of trying to take action, so it did take --

Q. Did it change its testing method, yes or no?

A. Did it change its testing method, no; it could not find a method to change to.

Since then or just in 1983?

Q. From 1983 forward, don't you agree that the FTC did not change its testing method, in any way, as a result of the problems with compensation; isn't that correct?

A. They have not modified the testing procedure.

Q. Okay. Now, you were at the FTC in 1983, when the FTC was seeking these comments from the public regarding possible modification of its testing

methodology, correct?

A. Correct.

Q. Let me ask you, if you will, to go back and look at Exhibit 6, which has been marked previously. Do you see that, a Federal Register?

A. Let me get these in order. That might make it easier.

I have it.

Q. And Exhibit 6, we've gone over before; that has your name there on the front page as the contact person for the FTC, correct?

A. Correct.

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Q. And Exhibit 6 is the Federal Register that seeks comments, it states that it's seeking comments; is that correct?
A. Yes.
Q. Let me show you now what we're marking as the next exhibit, which is number 85.
(DFT. EXH. 85, 5/31/84 FTC News article, was marked for identification.)
BY MS. PARKER:
Q. Exhibit 85 is a press release from the FTC, dated 1984, correct?
A. Yes.
Q. All right. If you look at the second page,

you're listed as the contact person for the FTC in this press release, correct?
A. Correct.
Q. This press release, again, is seeking comments on possible modifications to the cigarette testing program, correct, if you look at the first sentence?
A. Yes, I'm just trying to decide -- okay.
Q. Correct?
A. I'm sorry; what was the question?
Q. Exhibit 85 was a press release from the FTC, dated 1984, that lists you as the staff contact person and which states it's reopening the comment period on possible modifications to the cigarette testing program, correct?
A. Yes.
Q. Let me ask you to look back at what we marked previously as Exhibit 5, which is Mr. Peeler's remarks.
A. Okay.
Q. Do you have that?
A. I do.
Q. Now, the American Lung Association submitted comments to the FTC, correct?
A. On what page are you referring to?
Q. Well, I'm just asking you the question now. The American Lung Association submitted comments to the FTC --
A. And what I'm saying is, I don't have a great

memory over 17 years. Comments were received. If I'm to see if the American Lung Association was one of those who commented, I either have to look at the FTC files or look and see if Mr. Peeler said that that was one that they received.
Q. Okay. If you'll look at page 11 of his report, in particular at footnote 13.
My question is, do you agree that the American Lung Association submitted comments to the FTC?
A. Apparently, yes.
Q. And the American Lung Association stated to the FTC that "low-tar cigarettes might not be as safe as some consumers were being led to believe, in that the commission's testing and reporting procedures were contributing to questionable ads for safe cigarettes."
A. That's what that says yes, and I presume you accurately stated the data.
Q. Do you recall that the American Heart Association also submitted comments to the FTC?
A. Apparently, yes.
Q. If you look, still there at footnote 13, the

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American Heart Association expressed the view that the FTC -- FTC's testing and reporting procedures fostered the belief among consumer that low-tar cigarettes were safer than high-tar brands; do you see that?

A. I do.

Q. Do you have any reason to disagree with that statement?

A. Do I have any --

Q. Reason to disagree with that statement, that the American Heart Association expressed those views --

A. Oh.

Q. -- to the FTC?

A. Okay. But not what they said, but the fact that they said it?

Q. That the American Heart Association expressed those views to the FTC.

A. I believe they said that.

Q. Let me ask you now to look over on page 13 of Mr. Peeler's report, and the paragraph that begins "In short," Mr. Peeler wrote, "Since then, current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that occurred since the 1950s, that the commission -- the FTC had made no changes to its test method as a result of the comments that were received from the American Lung Association, the American Heart Association, and others; is that correct?

MR. PATRICK: I'm sorry; we must not be on the same page.

MS. PARKER: Page 13.

BY MS. PARKER:

Q. It's actually two sentences there.

A. Uh-huh.

MR. PATRICK: Do you remember the question?

THE DEPONENT: Well, no, I actually want to see what leads up to it, because there's a discussion, not just of what the voluntary said, but also of what the industry said, and other things, and so I want to make sure I know why he said what he said, and then I can't remember the question, but let me just finish reading.

I'm sorry; now, what was the question?

BY MS. PARKER:

Q. Do you agree that the FTC made no changes to its cigarette test method in 1983?

A. Correct.

Q. And do you agree that the commission made no changes to its cigarette test method in 1983, according to Mr. Peeler, because the then current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that occurred since 1950s. That's what he said, correct?

A. Yes, he said that among all of these reasons that he mentions on the prior pages, this one counted against the other one, led the commission to decide not to

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take action at that time, because they, first of all, had no recommendation of what action to take, and that short of a recommendation on what action to take, the only choice they had was no test or a test, and that because of then current studies which suggested that there might be this decline, they were not prepared to abandon the test entirely.

Q. Okay. Well, the language he uses is not might. The language he uses is that there had been a decline.

A. That might be attributable.

Q. It says, "There had been a reduction in lung cancer deaths," that's what he said, correct?

A. That might be attributable to declines in average tar yield. I mean, the two parts of the sentence go together.

There had been a reduction at that time in lung cancer deaths. They didn't know what it was attributable to. And because it might be attributable to either filters or lower tar or any number of things, at that time the commission was unwilling to say let's abandon the system all together.

(DFT. EXH. 86, Federal Register, Vol. 50, No. 198, was marked for identification.)

BY MS. PARKER:

Q. Let me show you now what we've marked as Exhibit 86. Exhibit 86 is a Federal Register dated 1985, correct?

A. Yes, it has my name on it, too.

Q. Okay. Do you agree that the FTC proposed changing its testing methodology at that point in time by using filter holders?

A. This was not for the issue on compensatory smoke.

MS. PARKER: I move to strike the nonresponsive portion of your answer.

BY MS. PARKER:

Q. Here's what my question is, the FTC proposed changing its testing methodology at this point in time by using filter holders, correct?

A. I want to say yes, but I don't want it taken out of context, that this was strictly to do with Barclay.

Q. And you're listed on the second page as the contact person; I believe you acknowledge that, correct?

A. Yes, I do.

Q. Now, the changes that were proposed here in this Federal Register or proposed by the FTC were not adopted by the FTC, correct?

A. Correct.

Q. Now, did you advise the FTC at this time to change the FTC method because of compensation?

A. No, the purpose of this Federal Register notice, the comment period that followed, and the commission's failure to take action had solely to do with the issue of the Barclay and Kool Ultra, so that at this point in time we were trying to deal with that one issue.

Q. So in 1985, you did not go to the FTC and advise them to change their testing method because of compensation; is that your testimony?

A. I didn't do a lot of things. I mean, this

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doesn't stand for the proposition that I didn't tell them. This stands for the proposition that I did ask them to go forward with this, and it just so happens that there was no recommendation made on compensatory smoking at that time to make a modification.

Q. So in 1985, you did not go to the FTC in 1985, and ask them to change the FTC method because of compensation; isn't that correct?

A. That's correct.

Q. Okay. Let me ask you to look back at Exhibit 5, which is Mr. Peeler's remarks, and ask you, in particular, if you'll look at page 7. Mr. Peeler's remarks were dated 1994, correct?

A. Correct.

Q. And on page 7, in the paragraph that starts "These types of changes."

A. Yes.

Q. Okay. That refers -- bring your attention to about the middle of the paragraph, it refers to "limitations on the predictiveness of the FTC method caused by compensatory smoking being clearly recognized," and those are his words "clearly recognized by the mid-1980s." Is that what his position is?

A. Clearly recognized by the commission?

Q. Well, you see the sentence. It says, "In neither instance, did the information received by the commission form a sufficient basis for changing the protocol, even though the limitations on the predictiveness of the FTC method caused compensatory smoking -- caused by compensatory smoking were clearly recognized by the mid-1980s"?

A. Short of not knowing who he meant they were recognized by, they were certainly recognized by the commission and by many researchers.

Q. So you agree that those limitations that he described here on page 7 were recognized by the commission?

A. Yes.

Q. But the FTC still --

A. The commission --

Q. Let me finish my question. But the FTC --

A. I wanted to finish my answer when you asked me if it was recognized by the commission. You know, that's a building, that's five commissioners, that's all the staff. It was recognized -- the people on the staff knew it, I think. I think, probably the commissioners understood it as well.

Q. Yet the FTC still decided not to make any changes to the FTC test method, correct?

A. The commissioners did not decide that. They had nothing in front of them to act on. They did not receive a recommendation from staff.

Q. So the staff, the FTC staff still decided not to make any changes to the FTC test method, correct?

A. That's correct.

Q. Now, would you agree that there's a tremendous amount of influence that a smoker can exert on cigarette deliveries?

A. Do I agree that there is a tremendous amount of

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influence, consciously or unconsciously?
Q. Either.
A. Smoking behavior radically affects what the smoker gets.

Q. So your answer is yes?
A. I wouldn't put it that way. I would say that smoker behavior consciously can affect that smokers can draw in deeper to get more; that, unconsciously, smokers can change the amount they get because of certain biological needs. So that would be my answer.
Q. Those changes that you've just described that the smoker would make to exert on cigarette deliveries would be a tremendous influence, correct?
A. I wouldn't use the word tremendous; I wouldn't use the word exert. I mean, those are not concepts that work for me in talking about smoker behavior and the use of cigarettes. Smokers -- smoker behavior influences what the smoker gets, yes.
Cigarette design influences how they can get it and consciously or unconsciously -- well, cigarette design can also influence what they get, whether they want to or not.
Q. What's the extent to which smoker behavior influences cigarette deliveries to that smoker?
A. What extent?
Q. Uh-huh, to what extent? You said you weren't -- you didn't like the word tremendous; you didn't like the word tremendous influence. So I'm asking you what influence; how would you describe it?

A. How much influence?
Q. Does smoker behavior have on that smokers cigarette delivery.
A. Compared to what? It has an influence; it's an important influence. It's an important influence.
Q. Would you agree that if the goal of a cigarette smoking test is to provide a realistic indication of actual deliveries to smokers, all forms of manipulation that influence deliveries would have to be accounted for?
A. Could you read that back to me?
COURT REPORTER: Yes, I think.
Would you agree that if the goal of the cigarette smoking test is to provide a realistic indication of actual delivery to smokers, all forms of manipulation that influence deliveries would have to be included for?
MS. PARKER: Accounted.
COURT REPORTER: Accounted for?
THE DEPONENT: Well, I guess there would be more than one way of doing it. I mean, if you wanted to know what a smoker actually got, you could do biochemical markers, and then you wouldn't have -- you wouldn't have to model anything, so you could find out what smokers get by doing biochemical examination of body fluids.

So I don't know if you have to model everything.
If you wanted to find out how one smoker -- what one smoker got, not using a

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biochemical marker, I suppose you'd have to try to do all of the different varieties of -- you still might not be able to do it; you still might be better off with a good biochemical marker.

So I guess my answer would be, assuming I remember the question, my answer might be no.

BY MS. PARKER:

Q. During your tenure at the FTC, was there any consideration given to withdrawing the FTC's approval from the tar and nicotine rating system?

A. Consideration by the commissioners?

Q. Yes, by the staff, by the commission, the FTC, the commissioners, or the staff.

A. I certainly considered it.

Q. Well, did anybody besides you consider it?

A. You mean, did -- let's see, did anybody at any time consider withdrawing --

Q. The FTC's approval from the tar and nicotine rating system.

A. I, and perhaps one or two others, but it never got past that far.

Q. Did you make that recommendation?

A. Oh, I talked to Lee Peeler about it all the time.

Q. And your recommendations were always rejected?

A. Yep.

VIDEOGRAPHER: Counselor, can we go off the record to change tapes, please?

MS. PARKER: Sure.

VIDEOGRAPHER: Off the record at approximately 2:36.

(Off the record.)

VIDEOGRAPHER: Back on the record at 2:37.

BY MS. PARKER:

Q. Ms. Wilkenfeld, you're familiar with the National Cancer Institute Monograph 7, the conference and the study --

A. Yes.

Q. -- right?

And that was a conference that was convened by the National Cancer Institute to study the FTC cigarette method for determining tar and nicotine and carbon monoxide yields of U.S. cigarettes?

A. Could you read me the title again?

Q. It was a conference convened by the National Cancer Institute to study the FTC cigarette method for determining tar, nicotine, and carbon monoxide yields of U.S. cigarettes?

A. Yes.

Q. We marked, previously, as Exhibit 25 a letter from the FTC, dated 1994, that I'd like to ask you to refer back to.

A. Okay.

Q. In fact, the FTC is the one that requested the National Cancer Institute to convene the conference, correct?

A. To be absolutely accurate, Henry Waxman beat us to it by a month and a half.

Q. Well, this is a letter from the FTC, dated 1994,

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to the National Cancer Institute, correct?
A. I understand. Both Henry Waxman and the Federal Trade Commission asked for this.
Q. So the FTC was one of the parties who requested the National Cancer Institute to convene the conference, correct?
A. Absolutely.
Q. And in this letter requesting the conference, you are listed as the person of the FTC to contact, correct? It's page 4.
A. I certainly am.
Q. The FTC made a presentation at that conference, correct?

A. Correct.
Q. And as we previously discussed, that presentation was made by Mr. Peeler?
A. Correct.
Q. And you worked for Mr. Peeler?
A. And as I indicated earlier, after this letter was sent and before the hearing was held, I left the FTC and went to the FDA.
Q. But before you left the FTC, you worked for Mr. Peeler, correct?
A. I did.
Q. Now, the letter requesting the conference specifically requested that the following question be analyzed. If you look over on page 3, under paragraph number 3. "Is there a dose response relationship between FTC tar ratings and either specific smoking-related diseases or overall smoking-related morbidity and mortality"?
A. Correct.
Q. So in 1994, the FTC believed that that issue that I just read should be studied, correct?
A. Correct.
Q. Now, representatives of R.J. Reynolds Tobacco Company attended the conference, correct?
A. Again, I think Dr. Townsend might have

represented them.
Q. Dr. Dave Townsend attended the conference on behalf of R.J. Reynolds Tobacco Company?
A. I don't want to be absolutely -- say without seeing -- without seeing the document.
Q. Do you recall that Dr. Don deBethizy also attended the conference on behalf of R.J. Reynolds Tobacco Company?
A. Maybe it was Dr. deBethizy and not Dr. Townsend. I'd have to see -- you know, I'd like to see the book before I say yes to either one.
Q. Well, do you -- do you remember that representatives from R.J. Reynolds Tobacco Company were specifically invited to attend?
A. I don't know if they were specifically invited to attend, because by that time, I was not -- but I would assume they were. I was not at the FTC any longer.
Q. Were you at the FTC at the time the invitations were issued for the conference?
A. I don't think so, no. I left in -- I think, I left in September of '94.

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Q. Did you attend the conference?
A. I did, as an observer, from the Food and Drug Administration.
Q. Was it your understanding that those individuals

who were invited to attend the conference, were invited because the FTC thought they could provide some type of helpful insight, make some meaningful contribution to the conference?
A. My understanding of the conference would be that all sides needed to be heard from, and that would include the regulated industry as well as the researchers.
Q. Okay. Well, are you aware that the representatives from R.J. Reynolds Tobacco Company were the only representatives from any tobacco company who attended the conference?
A. I could have sworn I saw somebody there from Brown and Williamson. And if not -- I know I asked someone a question. If somebody was not there from Brown and Williamson, then I would have asked -- what's the lawyer's name from Covington, who took over after John Rupp?
Well, anyway, he was there, and I remember asking him, specifically, whether Brown and Williamson would be making the same statement to the NCI panel as they had made to the FTC back in 1983, which was that they didn't think that the system had much value. And I was told, no, they were going to sign on to the industry statement.
So I may have spoken to the lawyer at Covington

as opposed to a representative from Brown and Williamson.
Q. Well, sitting here today, can you testify, under oath, that a representative from a tobacco company attended the conference, other than the representatives of R.J. Reynolds Tobacco Company?
A. I can't testify to too many of the people who were there. I was --
Q. Let me --
A. -- in and out of the meetings.
(DFT. EXH. 87, 11/29/94 Article "The FTC Method Should Be Retained," submitted by R.J. Reynolds Tobacco Company, was marked for identification.)
BY MS. PARKER:
Q. Let me show you what we've marked as the next exhibit, which is Number 87, and that is the written response that was submitted at the conference by R.J. Reynolds Tobacco Company, dated 1994, correct?
A. Okay.
Q. Have you seen this --
A. I might have.
Q. -- document before today?
A. You know, I don't know.
Q. Well, this is a document that was submitted by R.J. Reynolds Tobacco Company to the FTC, correct?

A. In November of 1994, I was at the Food and Drug Administration. We were heavy into an investigation of whether tobacco should be regulated by the Food and Drug

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Administration. I attended the meeting. I wasn't there for all of it, and I probably -- I may have or may not have read this. I was really quite busy doing other things.

Q. Did you contribute, at all, to the Monograph 7 conference?

A. I think I said something. I was asked a question, and since I was there, I answered it. So I think, in fact, I answered a question. I contributed to the process during some of its development stage, at a couple meetings that were convened by -- the convening body who was doing it for NCI, had asked me to come to a couple sessions to talk to them about suggestions, so I certainly was involved in that, but I don't think I had an official function, as such, at the conference, because, as I said, I was at the Food and Drug Administration, and they were not a party to this.

Q. Now, the purpose of the conference, the intent of the conference was to examine the protocol and make suggestions for improvements, if warranted, to the FTC testing method correct?

A. That was definitely one of its -- yeah.

COURT REPORTER: I'm sorry?

THE DEPONENT: That was one of its purposes, certainly.

BY MS. PARKER:

Q. Well, that's the only announced purpose --

A. Okay. Then --

Q. -- of the conference, correct?

A. -- that was its only purpose.

I, you know, I would have to see the announcement again to see what its sole purpose was, if it had only one purpose.

Q. You don't -- you don't disagree, though, sitting here today, that the purpose of the Monograph 7 Conference, the announced purpose of the Monograph 7 Conference, was to review and propose modifications to the FTC tar and nicotine testing and ratings method, correct?

A. As I said, that was certainly one. If it was the only one, I'm not aware, but it was certainly one of the purposes.

Q. Okay. Now, Exhibit 87 was the written submission of R.J. Reynolds Tobacco Company that we've gone over, correct?

A. You have told me --

Q. 87; is that right?

A. No, you have told me this was what it is. What

it says to me on the front is that it's the FTC method should be retained, submitted by R.J. Reynolds Tobacco Company. It doesn't state to whom it was submitted.

Q. And the FTC's presentation was the one made by Mr. Peeler that we've marked previously, correct?

A. Mr. Peeler's presentation, I can testify to. This one, I can't.

Q. Now, let me ask you if you will look at Mr. Peeler's presentation, which was marked as Exhibit 5 previously. Do you have that?

A. Yes, I do.

Q. All right. Let me bring your attention to page

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3. In particular, the last paragraph on page 3, the FTC stated in its presentation that "the FTC initiated major steps to encourage cigarette manufacturers to provide consumers with comparative information about tar and nicotine yields," correct?

A. They took major steps in '66, yes.

Q. They took major steps to encourage cigarette manufacturers to provide consumers with comparative information about tar and nicotine yields, correct?

A. That's what it says, yes.

Q. So this exhibit that you have in front of you, Exhibit 5, is dated 1994 --

A. Correct.

Q. -- correct?

So in 1994, the FTC admitted this government involvement in providing the tar and nicotine information to consumers, correct?

A. In 1994, the commission admitted that in 1966 it took actions which would encourage --

COURT REPORTER: I'm sorry; I didn't hear you.

THE DEPONENT: Where did you lose me?

COURT REPORTER: Which would encourage...

THE DEPONENT: Cigarette manufacturers to provide consumers with comparative information.

COURT REPORTER: Thank you.

BY MS. PARKER:

Q. And if you'll turn over to page 5 of that same document, that first full paragraph, let's see, the third sentence here, "The FTC stated that the commission recognized that individual smoking behavior was just that, too individual to gauge what a hypothetical average smoker would get from any particular cigarette. No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion." Did I read that correctly?

A. Yes.

Q. And that's the FTC's statement in 1994 about its

position, correct?

A. That's a 1994 statement of what it said in 1967.

Q. All right. So the FTC had acknowledged, from the outset in 1967, that the FTC testing method did not replicate actual human smoking, correct?

A. Yes.

MS. PARKER: Can we go off the record?

MR. PATRICK: Yeah, let's just take a break.

COURT REPORTER: I'm sorry.

VIDEOGRAPHER: Okay. Off the record at 1:49.

(A recess transpired.)

VIDEOGRAPHER: Back on the record at 3:07.

BY MS. PARKER:

Q. Ms. Wilkenfeld, I want to ask you some more questions about Exhibit 5 that we've been going over here, Mr. Peeler's remarks to the National Cancer Institute, all right?

A. Okay.

Q. I want to ask you now if you'll please turn to

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page 5 and look at footnote 6, and in particular, the first paragraph of that footnote. "The FTC acknowledged that in 1967, many people in the government held the opinion that by encouraging smokers to switch to low-tar,

low-nicotine cigarettes we can contribute meaningfully to the physical health of our nation," correct?

A. I'm sorry; we're talking about footnote 6?

Q. Footnote 6.

A. Yeah.

Q. Okay. And what I -- my question is, is the FTC --

A. Oh, I'm sorry; I was reading the second paragraph.

Q. Okay. My question now is about the first paragraph. "The FTC acknowledged that in 1967, many people in the government held the opinion that by encouraging smokers to switch to low-tar nicotine cigarettes, we can contribute meaningfully to the physical health of our nation," correct?

A. Senator Magnuson said that that was the opinion of many people in government.

Q. Correct?

A. That's what that says, yes.

Q. Okay. And then, going on down to the second paragraph in footnote 6, "The FTC also told the media, in 1967, that the commission favors giving smokers as much information about the risk involved in smoking as is possible. And to that end, favors mandatory disclosure of tar and nicotine content as measured by a standard test,"

correct?

A. That's what that says.

Q. Okay. Now, didn't the Monograph 7 panel reiterate that low-yield tar and nicotine cigarettes could provide a reduced risk of lung cancer?

A. I'd like to see the Monograph 7 to know exactly the language they used.

Q. All right.

(DFT. EXH. 88, Monograph 7, was marked for identification.)

BY MS. PARKER:

Q. This will be Exhibit 88. And Exhibit 88 is a portion of the Monograph 7, and I'd like to bring your attention to the Recommendations and Findings section on page 239, the very bottom of the page, under A, "The committee reached the following conclusions with respect to the first question." And the first conclusion is "The smoking of cigarettes with lower machine-measured yields has a small effect in reducing the risk of cancer caused by smoking." Correct?

A. That would be a summary of a much longer chapter which explains what that sentence means.

Q. Well, that is -- that is the conclusion, that is the summary that the -- that was reached, correct?

A. That is the one-sentence conclusion that sums up

what a chapter would have done which would have explained what that was.

Q. Okay. In 1994, which was the date of the

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conference, did you have any reason to disagree with that conclusion that I just read at the bottom of page 239?
A. With the caveat that I assume the chapter that it's referring to talked about this reduction having occurred at the time of the introduction of filtered cigarettes with lower yields, I would have had no reason to disagree with that. But if it talked about a later period, I would have had reasons to disagree with it.
Q. Now, Dr. Kozlowski participated in the Monograph 7 Conference; didn't he?
A. Yes.
Q. Okay.
A. He did, yeah.
Q. All right. And you had previously retained Dr. Kozlowski as an expert for you, for the government, in the Barclay case; correct?
A. Correct.
Q. And --
A. He was retained; I didn't retain him.
Q. He was retained by the FTC?
A. Correct.
Q. And you would regard him as an authority in the

field of smoking and health, correct?
A. He is.
Q. Okay. And you would rely on his opinions with respect to scientific issues relating to smoking; is that correct?
A. Not that broadly, no.
Q. You would not rely on Dr. Kozlowski's --
A. On anything?
Q. Let me finish my question please, ma'am. Are you saying that you would not rely on Dr. Kozlowski's opinion with respect to scientific issues relating to smoking?
A. I would rely on Lynn Kozlowski's opinion on scientific issues on smoking within his area of expertise. I certainly wouldn't rely on his opinion as far as the etiology of cardiovascular disease, whether cigarettes produce impotence, things like that.
Q. What do you consider Dr. Kozlowski's area of expertise to be?
A. Addiction research, consumer psychology, compensatory behavior; I could probably say yes or no easier than I could probably list everything I think that he would say.
Q. Can you think of anything else, sitting here today?

A. Well, he's done studies on consumer responses to messages about low-tar products, he's done studies on hole blocking, he certainly has looked at the issue of addiction.
Q. Did you consider him an expert on compensation?
A. Yes.
(DFT. EXH. 89, Monograph 7, "The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes," was marked for identification.)
BY MS. PARKER:

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Q. Let me show you what we've marked as Exhibit 89, and this is another chapter from the Monograph 7. In particular, this is the chapter that's written by Dr. Kozlowski that's titled "Compensation for Nicotine by Smokers of Lower Yield Cigarettes"; correct?
A. Correct.
Q. Okay. Let me bring your attention, in particular, to page 168, under the summary; do you see that?
A. Yes.
Q. Dr. Kozlowski wrote, "The current FTC testing method used to estimate average tar and nicotine yields of cigarettes is compromised by compensatory smoking behavior

and individual variability among smokers," correct?
A. Correct.
Q. And it is true, isn't it, that Dr. Kozlowski's beliefs, regarding compensatory smoking, that were presented at this Monograph 7 Conference were fully consistent with what he had reported at the time the B&W Barclay case was brought by the FTC?
A. Everything he said at this '94 conference is fully consistent with everything he said in 1983 to the commission?
Q. That's my --
A. Is that the question?
Q. Yes.
A. I wouldn't be able to express an opinion on that. I could tell you whether his position that you just stated in that one sentence is consistent with his formal report to the commission.
Q. Is it consistent?
A. It's consistent. It may be based upon different evidence which he developed after that period of time. I mean, he had more fully developed opinions by '94 than he did in '83.
Q. But his opinions set forth here in the exhibit that we just marked as Number 89 is fully consistent with what he reported at the time of the B&W Barclay case,

correct?
A. That the current FTC method --
Q. Right.
A. -- was compromised by compensatory smoking in individual variability.
Q. Yes.
A. That's not inconsistent with what he told us at the time, that's right.
Q. Well, if something is not inconsistent that means it's consistent, correct?
A. You know, people -- knowledge continues to enhance over a period of time. To say it's consistent, does that mean it's the same as, or is that it's -- it's an elaboration as enhanced by additional evidence?
If by "consistent" you mean, did he have questions about the FTC method back in 1983? Absolutely. Did he believe it had to do with smoker variability and cigarette design? Absolutely.
Q. And he believed it also had to do with compensatory smoking behavior in 1983, correct?
A. That's right, individual consumer behavior.

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Q. Now, didn't the Monograph 7 study propose that changes be made to the FTC testing and rating system?
A. Yes.
Q. What were those?

A. I'd have to -- I can't -- I can't rattle them off without the book.
Q. Can you name any of them?
A. Oh, you know, I'm reluctant to say anything here without looking at something specific, truthfully.
Q. Now, isn't it true that the FTC has never taken any action with regard to modifying the testing and rating system in response to the findings and conclusions of Monograph 7?
A. Again, I have to take -- take them -- read the question again; I'm sorry.
Q. Isn't it true that the FTC has never taken any action with regard to modifying the testing and rating system in response to the findings and conclusions of Monograph 7?
A. I'd have to say, no, that's not true.
Q. What did they do?
A. They published a Federal Register notice indicating that they were going to make modifications in the procedure; they received comments, they closed down their Federal Register procedure because they then requested the Department of Health and Human Services to look at the underlying predicate for the entire low-tar controversy, and they testified to Congress saying this whole thing should be sent to the Food and Drug

Administration. Those are actions. The Federal Trade Commission has many different ways of taking action, those are actions.
Q. Isn't it true that the FTC has never changed its testing and rating system in response to their findings and conclusions in Monograph 7?
A. It no longer controls -- it doesn't do the testing. So if you're asking has it published anything in which it has suggested that it will no longer accept a certain methodology? They have not done that.
Q. Why not?
A. I'm not a member of the Federal Trade Commission; I have no idea.
Q. You don't know?
A. I can't speculate. I mean, what they said --
Q. What did --
A. What they said was that as a result of the comments that they received from the public health community, including from the Food and Drug Administration, the National Cancer Institute, various public health voluntaries, that they now had reason to question whether or not a vacation would be in the public interest and whether, in fact, abandonment of the process altogether might be more beneficial. And that's why they put it aside and asked the Department of Health and Human

Services to do another review of the underlying scientific basis.
Q. Just to be clear, though, the FTC has never

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changed the testing and rating system in response to any findings or conclusions in Monograph 7, correct?

A. Okay.

MR. PATRICK: I'm going to object to the question.

THE DEPONENT: I can't say yes or no, because the problem with the question is that they no longer do any testing; they haven't done any testing since the late-'80s.

What they could do is publish a Federal Register notice saying that unless certain changes were made to a test method -- well, it's not clear to me what they could have done. I guess I'm going to have to plead ignorance.

I remember discussing this with members of the -- I think I had this discussion with Lee Peeler, was that it wasn't clear to me what the commission could do, given everything that had happened, how they would make it well known.

BY MS. PARKER:

Q. Did the Monograph 7 panel consider measuring the PH of the cigarette smoke?

A. I think that was one of the issues that was raised.

Q. Now, isn't it -- are you through with your answer?

A. I think it was one of the issues raised; I don't know.

Q. Now, isn't it true that, even according to the critics, there's only been a slight increase in the PH and level of unprotonated nicotine in current cigarettes as opposed to earlier cigarettes?

A. No idea.

Q. Let me show what we're marking as the next exhibit, which is number 90.

(DFT. EXH. 90, Monograph 7, The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes, was marked for identification.)

THE DEPONENT: I should have brought my copy of the book.

BY MS. PARKER:

Q. This is, again, part of the Monograph 7, and I want to bring your attention to page 34.

A. Okay. Is this all going to be part of this Dietrich Hoffmann, Mirjana Djordjevic article?

Q. Yes.

A. Okay. I just wanted to make sure.

Q. Page 34 is the next to the last page.

A. No, I understand. I'm just -- I'm comfortable looking at just the end of a long article. I'm not making any comments on it. I'm on page 34.

Q. You're there?

A. Yes.

Q. All right. Let me bring your attention to the first question and the first answer. The question is by Dr. Harris, "Does the protonation state of nicotine, whether it's protonated or free-based, affect the

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measurement method of nicotine as currently used by the FTC"?

Now, Dr. Hoffmann answered, "No, the PH is not measured. I do not see the need, because so far, in our U.S. blended cigarettes, there are no major differences. That may change, but at present, it is not"; do you see that?

A. I do see that.

Q. Okay. Well, do you agree, then, that there's been so little change that there is no need to measure it?

A. I agree that Dr. Hoffmann believes that there is -- been no major change. I do not necessarily agree or disagree with the statement. I don't have enough

information.

Q. Do you know when the Monograph 8 study was conducted?

A. 8 was -- what was 8? Was 8 the one on -- Yes. No, I don't know the exact year. It was certainly after.

The problem with Monograph 7 was that although the -- although the meeting was held in 1994, Monograph 7 came out several years later, maybe even many years later. And by the time, I think, that Monograph 7 was published -- I can't --

Q. Do you know?

A. -- give you the dates of either.

No.

Q. Okay. Well, does it sound right to you that the Monograph 8 study was conducted in 1996?

A. Well, monographs aren't conducted, they're published.

Q. Or published --

A. I have no idea.

Q. -- in 1996? ?

All right. Now, the findings of the Monograph 8 study were consistent with what was reported in the Monograph 7 study, correct?

A. No.

Q. You disagree with that?

A. I disagree with that.

Q. Okay. How were they inconsistent?

A. I'd have to have a copy of number 8, but if I remember correctly, number 8 was the one that started talking about the types of findings that Michael Thun and others had found that there was, in fact, no decrease in lung cancer, in the developed risk of lung cancer, but without looking at Monograph 8, I don't want to be put on record as to what it did or didn't say. But I know that I felt, in terms of the FTC, that Monongraph 8 raised questions about some of the things in Monograph 7.

Q. How do you know what the FTC believed in 1996, since you'd left there then?

A. Because they said in a Federal Register notice, which I don't have, one of the questions they asked, when they put out -- when they put out their Federal Register notice asking for -- you don't know what -- do you have a copy of the -- you know, what it says.

(Tendered document.)

THE DEPONENT: Thank you.

BY MS. PARKER:

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Q. Will you just state for the record what you're referring to?
A. I am referring to the statement of opinion, my opinion, the basis for my opinion, and the things that are

attached to that. I am specifically looking at a document addressed to the Office of the Secretary of the Federal Trade Commission on the Federal cigarette testing methodology. And it's the FDA's comment to the FTC on the methodology.

Okay. On page 11 of that, it says, "Subsequent to the 1994 NCI report, the National Institutes of Health issued a monograph, which is Monograph Number 8, published in 1996, which found that the apparent mortality risk among current smokers had risen in the last 40 to 50 years. This finding is contrary to expectations that the switch by smokers to low-yield products would produce some health benefits. Therefore, one of the final questions posed by the commission asked whether the NIH findings called into question the benefit of low-yield cigarettes."

Now, I'd have to go back to the FTC's Federal Register notice to know how they put that, but it was my recollection that they did reference Monograph 8 and say does that -- does Monograph 8 call into question their proposal. But without seeing the Federal Register notice, specifically, I wouldn't want to be absolute.

Q. Okay. Now, this new study that you've referenced does not prove that lower-yield tar and nicotine products do not reduce the risk of lung cancer, correct?

A. Monograph 8 is not a study. Monograph 8 is a compendium of research.

Q. I'm referring to the new study that's referenced in Monograph 8. You've been telling me about a new mortality study, and my question is, this new study that's referenced in Monograph 8, does not prove that lower-yield tar and nicotine products do not reduce the risk of lung cancer associated with smoking, correct?

A. I'm not an expert in this field. I think that that question about whether it does or doesn't prove it has to be addressed to somebody who's expert. I know that I thought it called into question the benefits, if any, of low-yield products.

Q. If a tobacco company were to advertise a 35 milligram tar cigarette by saying there's no evidence that full flavor, higher-yield cigarettes present less risk than low-yield products, would you consider that advertisement to be truthful and not misleading?

A. I think that given the implications that smokers -- given smoker readings of advertisements, that there would be a significant percentage of smokers who would be deceived by that statement.

Q. Why?

A. Why? Could you read me the statement again?

Q. Sure. If a tobacco company were to advertise a

35 milligram tar cigarette by saying there's no evidence that full flavor, higher-yield cigarettes present less risk than low-yield products, would that advertisement be

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truthful and not misleading? And then I asked you what was the basis of your statement?

A. It would require many more qualifiers for people to understand that statement, and that that's actually -- I mean, short of what those qualifiers might be, which I can't tell you at the moment, I'd have to consumer test that. But that that statement, standing alone, could deceive a significant percentage of consumers, which by FDA's -- FTC's standards is between 15 and 20 percent.

Q. Well, even in light of this new evidence that you're referencing from Monograph 8 about the way low-yield cigarettes are smoked --

A. Uh-huh.

Q. -- isn't it true that the FTC still has not changed the testing and rating system that's been in place since 1967?

A. They have not, and that's why they asked the Department of Health and Human Services to please look at the issue and come back with an answer as to whether the system should be scrapped, and if it not, can it be modified.

Q. Sitting here today, the FTC has not changed it's

testing and rating system since 1967, correct?

A. With two caveats, I'll say yes. The first caveat being, as I said before, how they would change it is very difficult, because they no longer are doing the tests. And, secondly, I think they have intelligently asked the experts in the field to come back with a recommendation, and they are awaiting that recommendation.

Q. Since 1967, the FTC has not changed its testing and rating system, correct?

MR. PATRICK: Objection.

THE DEPONENT: I think, of course, it has changed it, with carbon monoxide, sued Barclay, I mean, there are a lot of things that happened, it abandoned doing the testing itself, so there have been changes. So, yes, there have been changes since 1967.

BY MS. PARKER:

Q. Changes to the testing and rating system?

A. Yeah, they added carbon monoxide. They delisted one cigarette which they thought was a complete out liar -- two cigarettes, excuse me. And they stopped doing the testing altogether. Those were changes.

Q. Well, they transferred the testing, correct?

A. No. They stopped testing. They did not transfer the testing. Transfer would indicate that -- no,

they did not transfer.

They stopped testing, the Tobacco Institute testing laboratory started testing, we had a consultant who was allowed to go there and to make sure that he was comfortable with it, and the information was collected by a Subpoena and still published by the FTC.

BY MS. PARKER:

Q. Let me show you now what we're marking as Exhibit 91.

(DFT. EXH. 91, 9/12/97 Federal Register, was marked for identification.)

BY MS. PARKER:

http://legacy.library.ucsf.edu/tid/shq07a00/pdf
Studies http://tobaccoindustrydocuments.ucsf.edu/docs/ftfl0001

Q. Now, in September, 1997, the FTC requested comments regarding its proposed revision of its testing methodology, correct?
A. That's what this purports to be. I was not at the commission at the time.
Q. And, specifically, the FTC had considered altering its reporting system to include ranges of potential tar and nicotine exposure, correct?
A. They were seeking a comment on proposed changes.
Q. And the changes included giving ranges of potential tar and nicotine exposure, correct?
A. I think they wanted to have two testing conditions.

Q. Well, why don't you look at the middle column on page 48158, it says, "The revised test method would produce tar and nicotine and carbon monoxide yields using both the current testing parameters and more intensive smoking conditions, thus producing a range of potential yields for each cigarette"; do you see that?
A. Right. They also proposed a multiplier which would -- which would obviate the need to have a second test. I mean, they proposed a lot of things.
Q. Well, the FTC -- my question is, the FTC considered altering its reporting system to include ranges of potential tar and nicotine exposure, correct?
A. With the caveat that I don't know how they were going to indicate in that -- in their disclosure, yes. They were considering two testing -- two testing procedures.
Q. That would produce a range of potential yields for each cigarette, correct?
A. Can you point me to where you're reading again?
Q. The middle column on page 48518.
A. Okay.
Q. The very first sentence, "The revised test method would produce tar, nicotine, and carbon monoxide yields using both the current testing parameters and more intensive smoking conditions, thus producing a range of

potential yields for each cigarette."
A. That's how they described what they were doing, yes.
Q. Okay. Let me bring your attention now to that same page, footnote 8 at the bottom of the page, in the request for comment that was published in the Federal Register, the FTC stated again --
A. Footnote 8?
Q. Footnote 8.
A. "The year before the commission's laboratory began."
Q. Right. Let me start over. "In the request for comment published in the Federal Register, the FTC stated, again, that in 1966," quote, "the preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content of cigarette smoke, the less harmful would be the effect," correct?
A. This goal was consistent with the then consensus of the scientific committee -- community, so the footnote refers to a historical period, yes.
Q. And the FDA supplied comments, and that's what

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we've marked previously as Exhibit 6 -- 7?
A. Really? Oh, 7, sorry.
Q. Do you have Exhibit 7 there?
A. Yes.

Q. Okay. And those are the FDA comments, correct?
A. Correct.
Q. And those are the ones that you drafted?
A. Correct.
Q. Now, it is true, isn't it, that your comments recommended that the FTC take no immediate action with regard to modifying its testing method --
A. That's right.
Q. -- correct?
A. Yes.
Q. And your FDA comments also stated, and this is on page 3, that, quote, "The FDA believes that more information is needed before modifications to the procedure can be formulated," correct? That's what that says, correct?
A. That's what that says.
Q. Okay. And you said, in your FDA report, that "there was a myriad of unanswered questions about the current system and how consumers use low-yield products," correct?
A. That's what it says, yes.
Q. And in this report, you also advise the FTC that there were new studies that questioned the scientific basis for the belief that low-yield products may have some beneficial effects, correct?

A. Correct.
Q. And in this report, the FDA recommends that the FTC provide additional time for research and analysis to take place, correct?
A. Correct.
Q. And in this report, the FDA noted that in 1966, and you can refer over to page 4 of this -- in 1966, the public health service reported that, quote, "the preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content of cigarette smoke, the less harmful would be the effect," correct, at the top of the page.
A. Right.
Q. And the FDA, in this report that you wrote, also stated, on page 5, the last sentence of the paragraph that began on the prior page, the FDA stated in this report you wrote that this goal was consistent with the then consensus of the scientific community, that lower tar and nicotine cigarettes should be less harmful than higher tar and nicotine brands, correct?
A. They certainly should have been.
Q. Okay. And the FDA submission cites this study from the Journal of the National Cancer Institute that's referenced there in, let's see, page 13, footnote 25?
A. Is that the Thun study?

Q. Yes.
A. Okay.
Q. Do you see that?

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A. I do.
Q. And the FDA noted that the findings of that study illustrates how past attempts to design less hazardous cigarettes largely have not been successful, correct?
A. (Pause.)
Q. Top of page 14.
A. I wanted to make sure that that was what he said.
Q. The lead author of the study stated that the findings also illustrate how past attempts to design less hazardous cigarettes largely have not been not successful, correct?
A. That's what this lead author said.
Q. Okay. Well, do you agree with that statement by the lead author?
A. I believe he made a statement that was certainly worth further investigation --
Q. Okay.
A. -- which is why we recommended that they not modify it at that time and find out more about what this is.

Q. But those attempts to design less hazardous cigarettes were, in fact, serious attempts by the tobacco companies, correct?
A. If you're talking about the low-tar product, no.
Q. No?
A. I don't believe that, no.
Q. What's the basis for that statement?
A. What's the basis for the statement? The basis for the statement is that the products -- the products -- after the introduction of filters, which did remove things from the delivery, but after -- after the introduction of filters, the primary mechanism seemed to be ventilation, which did nothing to reduce the tar and nicotine content, it merely gave the smoker air along with the product. I think the industry was aware that consumers were compensating and realized that, in fact, consumers would be getting more than the machine yields.
There is one document by Brown & Williamson that is cited in the Stan Clan (ph) papers which indicated that they were aware that they could have designed two different types of products, one which was -- which had real benefits, and one which was an image based.
You asked me my opinion as to why I said that, that's what it's based on.
Q. All right. If I heard your testimony correctly,

you said that the filters, the cigarette filters --
A. May have.
Q. -- were successful --
A. May have been successful.
Q. May have been successful in removing -- I believe the way you put it was things --
A. From the --
Q. -- from the cigarette smoke, right?
A. Well, and the reason I have to put it that way is that tar isn't tar, you know. And that was probably a naive assumption on the part of the public health community until it started looking.

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That, because the government had no knowledge of what was put into the product, we really had no knowledge of what came out of it, and it required research for years of testing to find out exactly what was contained in the tar, what were the 4,000 elements, which were toxic, which were mutagenic, which were carcinogenic. That over time, the cigarette companies changed what they put in, and so what they put in changed what came out.

As a result, trying to talk about reducing tar, the naive concept of less is better than more was just sort of obviated by both the design, it added more air, by the change in ingredients, actually even by changing from tobacco leaf to composite sheet, by the method of curing

the tobacco which made the introduction of more nitrosamines, all of these things changed over time.

So to try to pin down what exactly failed in the naive assumption that less tar was better than more, was is -- we see the results; we don't actually know what caused it.

Q. Let me ask you this, do you agree that there have been attempts by the cigarette companies to design less hazardous cigarettes?

A. Do I agree there have been attempts by tobacco companies to design less hazardous cigarettes? I believe there have been attempts to design less hazardous cigarettes. I don't think they were the low tar.

Q. Well, my question is just exactly what you have down -- what is in this paper that you prepared.

Do you agree that there have been past attempts by tobacco companies to design less hazardous cigarettes? Let me just ask that general question, first.

A. Okay. If you're asking me, regardless of what Thun said.

Q. Right. I'm just asking you --

A. Okay. Forgetting that?

Q. -- do you agree?

Yes.

A. Yes, in the investigation that FDA had of -- it

uncovered what it thought were attempts by the industry to design less hazardous products.

Q. One of those attempts are the cigarette filters; is that correct?

A. I don't know. You know, I mean that was not something that was mentioned in the FDA report, and I think filters probably started as a way of keeping tobacco out of your mouth. There certainly have been some filters that have been touted as having some health benefits.

There are some researches who believe that charcoal filters may have some health benefits, so it's possible. It's definitely possible that filters may have been one of the ways that industry tried to design a product with less toxic consequences.

Q. You just don't know, one way or the other; is that right?

A. You mean which ones were and which ones weren't, and which were genuine and which weren't?

Q. Well, I want to ask you, first, if you can -- I'm going to ask you about certain different designs, and the first one I'm asking you about are the cigarette

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filters. I'm asking you if you have an opinion, do you know one way or the other, whether, first of all, cigarette filters was an attempt to design a less hazardous cigarette; do you know?

A. I don't know. I mean, I know Kent's methanide filter with asbestos certainly wasn't -- caused more harm than good.

Q. What about ventilation, efforts to increase ventilation, do you agree that efforts to reduce -- I'm sorry, that efforts to increase ventilation in cigarettes was an attempt to design a less hazardous cigarette?

A. No.

Q. You do not?

A. I do not.

Q. What's the basis of your disagreement with that statement?

A. I believe it is a -- you asked my opinion. That my opinion is that it does not, that the ventilation was a means of producing a smoke delivery to the machine that was lower.

I base my opinion on history, I think, talk about the holes, you know, the holes started as a means of adding air. They're now microscopic. If the holes were merely a means of creating a -- an aware -- a means of reducing the tar and nicotine delivery and you wanted people to avoid it, you wouldn't have made the holes so microscopic so people couldn't find them.

Barclay cigarettes is another example, adding things to the product that makes it burn quicker so that

it has fewer puffs on the machine. I don't think any of those were genuine attempts to reduce consumers' exposure to toxins at all.

Q. Well, are you aware that Reynolds attempted to minimize hole blocking by putting the vent holes away from the mouth end of the cigarette?

A. No, I'm not aware of that.

Q. You haven't studied that issue, you haven't looked into that issue?

A. Am I -- the issue on hole blocking is -- am I aware that they --

Q. Are you aware that Reynolds attempted to minimize hole blocking by putting the vent holes away from the mouth end of the cigarette? Are you aware of that?

A. You mean not in the filter? Putting them somewhere in the rod?

Q. No, ma'am. If you'd just listen to my question. All I said was, are you aware that Reynolds attempted to minimize hole blocking by putting the vent holes further away from the mouth end of the cigarettes?

A. And what I'm asking is, I don't understand the question, do you mean they moved them on the filter? Are you asking me did I know that they might have moved them in the filter?

Q. Well, do you know either way. Do you have any

knowledge whatsoever about any efforts that Reynolds undertook to minimize hole blocking by changing the location of the vent holes?

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A. I'm not aware --
MR. PATRICK: Objection. Objection, assumes facts not in evidence, lack of foundation.
BY MS. PARKER:
Q. Your answer was -- I'm sorry, I couldn't hear your answer from the objection.
A. I don't know.
Q. Okay. Now, isn't it true that the effect of the recommendation --
A. Can I go back and make another statement? Which was at the time of the 1983 and subsequent period, when we raised questions about compensatory smoking, if this had been done, it was not brought to the commission's attention by R.J. Reynolds. So if it was something that was done, and it was meant to address an issue of public concern, it was not brought to the attention of the agency that would have been responsible, that I remember.
Q. And that's your testimony?
A. That's my recollection.
Q. Have you looked into that issue?
A. No, I have not looked into that issue. And as I say, you know, 17 years back, it's hard for me to

remember, but I don't have a recollection about that.
Q. All right. Let me ask this, are you aware that any other tobacco company attempted to minimize hole blocking by changing the location of the vent holes?
A. I have to give the same answer I gave with R.J. Reynolds; I don't know. I don't know that they did, and I don't know that they didn't.
Q. Do you know who Dr. Farrone (ph) is; don't you?
A. Yes; I've not met him.
Q. You understand he's an expert for the Plaintiff in this case?
A. I've been told that, yes.
Q. Okay. Do you understand that he was previously a scientist at Philip Morris?
A. Was he at Philip Morris? I have to take your word for that.
Q. If Dr. Farrone testified that Philip Morris, in fact, attempted to minimize hole blocking by putting the vent holes away from the mouth end of the cigarettes, you wouldn't have any reason to dispute Dr. Farrone's testimony; would you?
MR. PATRICK: Objection.
THE DEPONENT: You know, I have no way to know one way or the other. I mean, I have testimony from Victor Dynobal (ph) that Philip

Morris knew about hole blocking, in fact there was a project from the psychological group at Philip Morris that actually filmed people smoking to determine --
COURT REPORTER: I'm sorry; I'm sorry, I didn't hear you.
THE DEPONENT: I'm sorry, that Victor Dynobal stated that Philip Morris knew about hole blocking and stated absolutely, yes, there is no doubt about that.
In fact, there was a project in which the psychology group at Philip Morris actually filmed

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people smoking to determine where filter and dilution holes should be placed so that the fingers would cover them up. That's what he said.

Dr. Farrone may be correct, that there were other projects in which the holes were moved so that they wouldn't be covered. I don't know what Philip Morris actually did.

BY MS. PARKER:

Q. My question was, do you have any reason to dispute Dr. Farrone's testimony?

A. I have no reason to credit it or dispute it.

Q. Now, isn't it true that the affect of your recommendation here in this FDA report, to take no

immediate action, served to keep in place the same tar and nicotine rating system that's been in place, virtually unchanged, for 30 -- over 30 years?

A. Okay. It's not a report, it's a comment. A report would suggest that there was independent research. It's a comment filed by one federal agency to another. I would love to believe it was my fault. I think that we were just one commentator among many.

Many -- what we said was that the modification -- they only took half of the NCI's recommendations. They did not look at the entire range of issues.

Had they made a different recommendation, we might or might not have been able to go along with it, but the recommendation that they made would have been inadequate.

Q. All right.

A. And I don't know whether it resulted. You know, I don't know what the -- why the five commissioners decided to go ahead or not to go ahead.

I don't know whether they thought that we were so compelling that they couldn't go forward, I don't know if they got pressure from Congress, I don't know if the industry told them don't do it, I don't know why they did it.

Q. Well, the document that you prepared, you've been testifying about here, that we marked as Exhibit 7 --

A. Uh-huh.

Q. -- this FDA --

A. Right.

Q. -- document --

A. Yeah.

Q. -- the effect of your recommendation in that document, the effect of it, of taking no immediate action, would serve to keep in place the same tar and nicotine rating system that has been in place for over 30 years, correct?

A. If the choices were, which is what we felt -- we were --

Q. Could you just answer my question, please?

A. I can't.

MR. PATRICK: Objection, she's answered.

THE DEPONENT: I can't. I can give you a full answer, or I can just say I don't know.

BY MS. PARKER:

Q. Isn't it true that smokers are better off, not

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worse off, with the option of smoking a low-yield tar and nicotine cigarette?
A. I don't believe that.
Q. Do you believe that smokers are worse off, not

better off, with the option of smoking a low-yield tar and nicotine cigarette?
A. I'll know a whole better when I hear from the HHS panel.
Q. I'm asking you what your opinion is today.
A. At the moment my opinion is -- would you read it again? Sorry.
Q. Well, my first question is, isn't it true that smokers are better off, not worse off, with the option of smoking a low-yield, tar and nicotine cigarette?
A. Oh, and I think they're much worse off, because many would have quit had there not been this option. So they're worse off by something on the market.
Q. Well, if consumers are worse off by having a low-yield tar and nicotine cigarette on the market, how could you, in this document that you prepared at the FDA, that we've marked as Exhibit 7, recommend that the FTC take no immediate action?
A. Because one of the options was not for them to stop. One of the things we recommended -- I mean, the options were continue as planned, make these changes which we thought would not improve it dramatically, if at all, and do nothing about light and low tar.
Q. My question is, if you think that consumers are worse off by having a low-yield tar and nicotine cigarette

on the market, how could you, in this FDA document, recommend that the FTC take, in your words, no immediate action?
A. We were asked to comment on their recommendation. Their recommendation would not have produced any benefit.
If it's not going to produce a benefit, why would we want them to take action, why would we want them to do that?
If they had done that, if they had gone ahead with their recommendation, we would have had another five years of government-sponsored testing which would have been misused by the industry in advertising, which would have promoted a product that was not found to be more beneficial. I have no problem at all with our recommendation.
Q. Now, the State of Massachusetts engages in its own testing of tar and nicotine levels in cigarettes, correct?
A. Are they testing or are they merely collecting data from the companies? I'd have to see their notice. I don't think they're doing any independent testing; I may be wrong.
Q. The State of Massachusetts publishes numbers for tar and nicotine levels of cigarettes, correct?

A. I don't want to make too many definitive comments without seeing what they've published.
Q. Have you ever reviewed what they've published?

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A. What do you mean "reviewed," looked at?
Q. Yes. Have you ever looked at what the State of Massachusetts has published regarding --
A. I --
Q. -- let me finish my question -- regarding tar and nicotine levels of cigarettes?
A. Tar and nicotine, you mean the range? I have seen it, yeah, I've read it.
Q. You just can't remember what it says today?
A. Uh-huh.
Q. Is that correct?
A. Yes.
Q. Now, the Massachusetts test results that have been published have gotten wide publicity in the media, correct?
A. They've certainly gotten publicity.
Q. And have you seen some of those reports in the media?
A. I've got the test results on the test. I've seen -- I've seen more in the press about the controversy about the Massachusetts tests than I have about the tests themselves.

Q. And Massachusetts does not use the FTC method, correct?
A. Going back, again, I'm not sure that the State of Massachusetts is doing the testing.
Q. My question was, whether they do the testing or someone else does the testing, do you agree that Massachusetts does not use the FTC method?
A. If I remember correctly, Massachusetts has a range, one of which is the FTC numbers. The other of which is a more intense smoking regimen.
Q. Are you aware that the FDA has analyzed the Massachusetts testing method?
A. The FDA did?
Q. Are you aware of that?
A. Am I aware that FDA analyzed --
Q. The Massachusetts testing method.
A. Looked at, retested? I don't know what you mean by analyzed.
Q. You don't know what analyzed means?
A. Not in this context, no.
Q. Do you know whether the FDA has done anything with respect to the Massachusetts testing method?
A. I know I and another staff person went up to Massachusetts while we were preparing this comment and went through all of their files.

Q. What did you review?
A. Boxes of documents, all of their submissions, reports, things like that.
Q. But you just can't remember that information today to answer questions?
A. I don't want to be pinned down to specificity, because I don't have a good enough recollection of specificity. I did go through what they did. I looked that they had consumer data on consumer perception.
Q. You looked at that information as part of -- as part of your work to prepare the FDA document that's been marked as Exhibit 7?

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A. Yes.
Q. Okay. But in Exhibit 7, the FDA did not recommend that the FTC change its method to follow the Massachusetts format, correct?
A. Well, one, that isn't one of the questions that FTC asked, and government agencies usually try to -- ask and answer format. And, secondly, no, we didn't recommend that.
Q. Are you aware that this new method used in Massachusetts has not made any difference in anyone's smoking in Massachusetts? Are you aware of that?
A. Am I aware that the publication of data by Massachusetts has not made any difference? I have no

knowledge on that subject.
Q. Now, every year, Federal law requires the FTC to make a report to Congress pursuant to the Labeling Act, correct?
A. FTC, right?
Q. FTC.
A. Yes.
Q. Have you reviewed the most recent report to Congress?
A. I don't know. Which one is the most recent?
Q. Let me show you --
A. Actually. Probably not.

(DFT. EXH. 92, 1997 Federal Trade Commission Report to Congress, was marked for identification.)

BY MS. PARKER:
Q. I show you what we've marked as Exhibit 92. Have you seen Exhibit 92 before today?
A. I've certainly seen it. I may have even read it.
Q. Let me bring your attention to page 3, the paragraph at the bottom that begins, "Over the past 30 years"; do you see that?
A. Yes.
Q. Okay. So in this report to Congress, the FTC

stated that over the past 30 years, the current system -- that the current system has been in place, there have been dramatic decreases in the machine-measured tar and nicotine yields of cigarettes, correct?
A. Correct.
There isn't any way I could do this standing up for a few minutes, is there? If I stood up, could you --
MR. PATRICK: Why don't we take a short break?
THE DEPONENT: I'm not sure that will help. I think I need to stand for awhile, but a break might help. Okay.
BY MS. PARKER:
Q. Are you ready?
A. Yes.
Q. Let me read this again, since you got up. In this report to Congress, the FTC stated that over the past 30 years that the current system has been in place, there have been dramatic decreases in the machine-measured tar and nicotine yields of cigarettes, correct?
A. That's what it says, yes.

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Q. And you have no reason to dispute that statement by the FTC to Congress; do you?
A. No.
Q. And if you look at page 4 of that document,

middle of the page, "The report to Congress also acknowledged that limitations on the tar and nicotine ratings," quote, "have been present in the system since its initiation in 1967," correct?
A. That's what they stated.
Q. Do you have any reason to dispute that statement that the FTC made to Congress?
A. I would agree that the limitations -- the limitations in the system, because of cigarette design, were there from the beginning. When they became of greater concern, I may -- I may disagree with the commission.
Q. Well, the only statement I asked you whether you agreed or disagreed with was that the limitations have been present in the system since its initiation in 1967. Do you have any reason to disagree with that statement?
A. You know, a sentence -- there have been limitations in the system since 1967.
Q. And the FTC requested that the Department of Health and Human Services conduct this review of the FTC's testing methodology that you've been talking about today, correct?
A. Yes. I would describe it differently than they do, but, yes.
Q. Well, the FTC is the one that is obligated by

law to make this report to Congress, correct?
A. Correct.
Q. And it's the FTC's testing methodology that's at issue, correct?
A. And that's how they describe it, yes.
Q. Okay. And the FTC requested -- I'm sorry, the FTC acknowledged that on page 5, quote, "It does not have the specialized scientific expertise needed to design scientific test procedures"; do you see that?
A. Correct.
Q. And if you look at footnote 6 there, on page 5, "The FTC further admitted that there are inconsistent findings as to whether or not cigarettes with lower-tar ratings are less harmful," correct?
A. That's what they state.
Q. And the FTC wrote in this report to Congress that, quote, "Among other things, HHS's review is designed to reconcile the findings of recent studies suggesting that cigarettes with lower-tar ratings may not be less harmful, with the findings of other studies, suggesting that there may be some risk reduction from the use of lower-tar cigarettes"; do you see that?
A. That's what FTC said, yes.
Q. And that's what FTC said to Congress in this report; correct?

A. That's right.
Q. All right. Now, let me ask you, if you will, to look at page 3, footnote number 3. The FTC acknowledged,

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here on page 3 that, quote, "When the test method was adopted, which would have been in 1967, the public health community believed that the preponderance of scientific evidence strongly suggest that the lower the tar and nicotine content of cigarette smoke, the less harmful would be the effect"; do you see that?

A. Correct, that's what it says, yes.

Q. And, now, you are not an expert on whether or not lower tar, lower nicotine cigarettes are, in fact, less harmful, correct?

A. Correct.

Q. Now, you're familiar with the study and the article in the recent issue of the Journal of the National Cancer Institute by Djordjevic, correct?

A. Correct.

Q. And you coauthored an editorial on that study --

A. Correct.

Q. -- and your editorial appeared in the same issue of the Journal of the National Cancer Institute?

A. Correct.

Q. Now, it is true, isn't it, that the study concludes that the FTC method underestimates actual tar

and nicotine doses to smokers?

A. Correct.

Q. Let me go ahead and mark that as Exhibit 111 -- no, I'm sorry, Exhibit 93.

(DFT. EXH. 93, Article, "Doses of Nicotine and Lung Carcinogens Delivered to Cigarette Smokers," was marked for identification.)

BY MS. PARKER:

Q. Exhibit 93 is the study that we are talking about, correct?

A. Correct. With the caveat that I did the policy work; those on the article with me, who were scientists, did a review of the scientific work.

Q. Well, what we've marked here as Exhibit 93 is not your article --

A. Right.

Q. This is the study --

A. Right.

Q. -- correct?

A. Right.

Q. And let me ask you to look at pages 109 to 110 of the study. Now, you stand by the statements that you put in your editorial, correct?

A. Correct.

Q. Okay. Let me --

A. But I cannot justify the ones that are scientific. You can ask the people who authored those, but I respect the people that I work with, and so I'll standby my respective -- their analysis.

Q. Okay. Let me ask you to look here, on page 109.

A. Uh-huh.

Q. The study concludes that "On a per cigarette basis, smokers of medium-yield cigarettes received higher doses of nicotine and tar, and more important also BAP and NNK, than did smokers of low-yield cigarettes"; do you see that statement?

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A. Yes.
Q. And thus, the article goes on, "Low-yield cigarettes delivered lower levels of carcinogens to the smoker than did medium-yield cigarettes," correct?
A. (Pause.)
Q. Page 10 -- page 110, right-hand column, it says, "Although low-yield cigarettes delivered lower levels of carcinogens to the smoker than did medium-yield cigarettes."
A. Yes, that's what it says.
Q. So isn't it better for a smoker to ingest lower levels of carcinogens?
A. There was a later study -- well, you know, that

depends. It depends where the dose response relationship exists, and it depends whether the difference is important medically. That's out of my field, but I know, from talking with these folks and with the people who I worked with, they felt that the differences were not significant enough, given the results of the epidemiological studies, such as the one that Thun had done.
Q. Let me ask you to please listen to my question.
A. Okay.
Q. Here's my question. Isn't it better for a smoker to ingest lower levels of carcinogens; wouldn't you agree with that statement?
MR. PATRICK: Objection, she's answered that.
THE DEPONENT: And you can't make it an unqualified. It should be, but it isn't always. Less is always better than more, but less may still kill you at the same rate. It depends on the minimum dose necessary to produce disease, it depends on the time period, all of that, so I can't say that it's always better to ingest less than more, it might be just as bad.

BY MS. PARKER:

Q. Do you understand that low-yield cigarettes can reduce smoking risks by some amount?

A. As I said, the data today suggests that that may not be the case, and that's what I'm waiting to hear from HHS.
Q. Well, would you agree that your view is that the jury is still out on that question?
A. My opinion is that it probably doesn't reduce the risk, but it --
Q. Would you agree that that issue has not been decided?
A. I believe that the Department of Health and Human Services will deliver an opinion which will help progress us along that route to finding a definitive answer. I think it's very hard to have an answer to something that requires years to develop.
Q. Well, do you think, today, here in your deposition, do you think that there's a definitive answer, in your words, to the question of whether low-yield cigarettes can reduce smoking risk by some amount?
A. Okay. I heard this put in another way, which is if you had a kid who smoked, would you ask them to smoke low-yield? And my answer would be I don't think it would

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make any difference, and I have a kid who smokes. So I would say, on an individual basis, no, I don't think it would -- it's beneficial.

Q. My question is, is there a definitive answer

today? Are you testifying that there's a definitive answer to this question today?

A. I'm not testifying on this subject.

Q. I'm asking you what your opinion is since your -- you've said several different things this afternoon, and what I want to know is, do you believe that there is a definitive answer to the question as to low-yield cigarettes can reduce smoking risk by some amount; that's my only question, do you believe there's a definitive opinion?

A. I believe --

MR. PATRICK: Objection.

THE DEPONENT: I have an opinion. I believe other people have different opinions. That's the best I can do.

BY MS. PARKER:

Q. Now, in your editorial that you wrote, you suggested that the FTC tar and nicotine testing method should be scrapped, because consumers are being mislead that low-tar cigarettes are, quote, healthier and safer and have less risk, particularly if this ongoing HHS study finds low-yield products no safer. That's what you said in your editorial, correct?

A. Correct.

Q. Now, that editorial is inconsistent with the FDA

comments that you drafted, correct?

A. They're separated in time and one represents my unvarnished opinion and the other represents my opinion as a government official.

Q. Do you acknowledge that your editorial and that the FDA document that we've marked here are inconsistent?

A. I don't think they're inconsistent. I don't think we ever said you should keep the FTC method in the FDA comment.

Q. The FDA comment says that the FTC should take no immediate action on the issue, correct?

A. The FDA comment said the FTC should not do what it recommended doing, that's what it said. It should not do what it recommended doing, it should look at this -- there had to be a better answer than what they recommended. We answered the question that was asked. The question that was asked is, does this modification improve the situation? We said no.

Q. Well, what has changed between two and a half years ago when you drafted the FDA document and the time that you prepared this editorial in the Journal of the National Cancer Institute?

A. First of all, they're not inconsistent.

Q. I asked you what's changed.

A. Well, I'm not sure anything has to change, given

the fact that the two are not inconsistent.

One of the things that changed is I'm not in the government, so that the opinions that I write can now

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represent my opinion, as opposed to the opinions of the agency I represent.

As a Federal official, I would draft a response to a Federal Register notice to the questions proposed by the agency that wrote the Federal Register notice.

In this particular editorial, I could also give my opinions as to what would be best for the public health.

So I don't know if that's a change.

Q. In your opinion, is there no such thing as a low tar and nicotine cigarette that poses less health risk?

A. Oh, I bet there is. And I bet you could put on a HEPA filter on the end of a cigarette, no ventilation, no citric acid to make it burn, couldn't get anything through it, I bet that would be healthier.

Q. If the FTC system were scrapped and the average tar and nicotine levels were to rise, is it your belief that smokers would be better off?

A. If we're talking about all smokers, including those who have not yet entered the market and those who might decide to quit, yes, smokers in general will be better off, because they might quit knowing that they will

quit -- some will quit, because they have no option. There is no so-called safer product on the market. So, yes, smokers will be better off.

Q. To your knowledge, is there such a thing as a safe cigarette?

A. A safe cigarette?

Q. S-a-f-e, safe cigarette.

A. Not safer, but safe.

Q. S-a-f-e, safe cigarette?

A. No, unless it's unlit.

Q. To your knowledge is there such a thing as a safer, s-a-f-e-r, safer cigarette?

A. Well, one of the reasons we formed the committee on tobacco product change was to find out if that was the case, because we think that that's the way the market has to go. There will be people who will continue smoking, and there has to be a way to reduce their health burden.

We're not in the business of designing it, but we'd sure like to be in the business of finding out if it's possible. So I would give the hope-- I would give a hope that it could be. There might be one out there. You know, it might be Eclipse for all I know.

Q. Is there a safer feasible alternative to cigarettes that's now on the market?

A. Is there a safer feasible -- yeah, not smoking.

You mean --

Q. Is there a safer feasible alternative to cigarettes now on the market?

A. An alternative to cigarettes?

Q. Is there a product that is a safer feasible alternative to cigarettes now on the market?

A. If you're referring to a nicotine delivery system, any nicotine delivery system, the pharmaceuticals are safer, because they have -- they don't produce tar. They have some problems, but they don't certainly have the problems of producing the toxins that are inhaled in the lungs.

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There is some evidence that the Swedes have produced a type of smokeless tobacco called SNOOZE (ph), that delivers nicotine in a form that, of course, doesn't produce lung cancer, but has a reduced risk of cancer to the mouth and throat, which is where smokeless tobacco has most of its problems.

Q. Is that a cigarette?

A. You didn't say it had to be a cigarette. You said is there an alternative to the cigarette.

Q. I'm asking you a question --

A. Oh.

Q. -- is that a cigarette?

A. Of course not, it not smoked. If you're asking

me is there something that can be smoked that's on the market? What are you asking me?

Q. Well, the question that was pending was, is there a product --

A. That's right.

Q. -- that is a safer feasible alternative to cigarettes now on the market?

A. And I answered -- all of those things I answered are a safer alternative to cigarettes, and they deliver nicotine.

If the reason people smoke is because they want to get nicotine to satisfy addiction, then these products would be safer alternatives.

Q. But none of those products you just listed are cigarettes, correct?

A. There's a nicotine inhaler, but I -- no, the difference between the nicotine inhaler and the Eclipse, I don't know; that's an interesting question.

Q. Well, my question is, of these products that you mentioned, the pharmaceuticals, the Swiss product, and such, are any of those products cigarettes?

A. And what I'm saying is if Eclipse is a cigarette, perhaps the nicotine inhaler produced by -- I don't know which pharmaceutical company -- might be a cigarette and that would be safer.

Q. Now, these products that you mentioned, I want to make sure I've got your list down, pharmaceuticals --

A. Oh, I wasn't finished. There were more.

Q. Go ahead.

A. This is my personal belief, as opposed to the belief of the, necessarily, public health community. I believe smokeless tobacco is not as dangerous as cigarettes, depending upon how it's used, because there's a different disease production and the ability to interdict at a point in time. It also has a lower incidence of that disease. Chewing tobacco even more than snuff.

Michael Russell certainly believes that nasal snuff is a safer alternative to cigarettes. It's hard to tell from usage patterns whether it's the lack of use or what, but cigars and pipes appear to produce less disease than cigarettes, but again that's a harder one, because it may be how they're used as opposed to whether they're inherently safer.

So all of those nicotine delivery systems have different risk patterns. I think the most dangerous is

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cigarettes.
Q. Is that the end of your answer?
A. I think so.
Q. All right. Let me go down each one of these.

You mentioned smokeless tobacco?
A. Yes.
Q. Smokeless tobacco is not a cigarette, correct?
A. Correct.
Q. You mentioned pharmaceuticals; pharmaceuticals are not cigarettes, correct?
A. With the caveat of the inhale.
Q. You mentioned chewing tobacco, cigars, and pipes; those are not cigarettes, correct?
A. They're not cigarettes, but they're inhaled or smoked tobacco, right.
Q. And nasal snuff and then the Swiss product that you mentioned are not cigarettes, correct?
A. Correct.
Q. With the exception of the nicotine inhaler that you say may or may not be a cigarette, do you know of any product that is similar to a cigarette that you would consider a safer feasible alternative to cigarettes that are on the market?
A. Safe or safer.
Q. Safer, feasible alternative.
A. Well, as I said, I thought that -- and because cigars are rarely inhaled, unless they changed the PH, they're probably somewhat safer than cigarettes, and that's burned tobacco; I don't know.

Q. When did this nicotine inhaler become available?
A. You know, I don't know. I've seen it on the market for at least a year or two. I don't know much about it. I've actually seen the ad for it.
Q. Did it come out sometime in the late-'90s?
A. Probably.
Q. It wasn't available, say, back in the '80s; is that correct?
A. Definitely wasn't, no. It just reminds me a lot of Eclipse.
MR. PATRICK: Why don't we take a few minutes at this point?
MS. PARKER: Okay.
VIDEOGRAPHER: Off the record at 4:25.
(A recess transpired.)
VIDEOGRAPHER: Back on the record at 4:55.
BY MS. PARKER:
Q. Ms. Wilkenfeld, wouldn't you agree that R.J. Reynolds has always been in compliance with the FTC tar and nicotine testing method?
A. You mean that their advertisements contain the --
Q. R.J. Reynolds has always been in compliance with the FTC tar and nicotine testing method, correct?
A. The commission has never challenged R.J.

Reynolds about an advertisement or a statement, as far as the testing methodology is concerned. Questions have been raised.

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Q. But you agree that Reynolds has always been in compliance with the FTC tar and nicotine testing method, correct?
A. No, I said that the commission has never charged Reynolds with the violation of the tar and nicotine -- with the tar and nicotine testing violation.
Q. Well, if there had been a violation by Reynolds, the FTC would have charged Reynolds with that violation, correct?
A. No.
Q. Why not?
A. Because as I explained the last time, the commission does not bring every action that it might have basis for, it doesn't have the staff or the resources to be able to do that. It has to pick and choose and choose among the more egregious. Violations at times, if there is more than one violation, it has to decide which ones to pursue and which ones not.
Q. Are you testifying here today, under oath, that Reynolds has not been in compliance with the FTC tar and nicotine testing method?
A. No. I'm just not saying that they've always

been in compliance.
Q. Well, do you know whether they have or they have not been?
A. Concerns were raised about both Reynolds and Philip Morris back in 1983. We investigated them and determined that we weren't going to take action at that time. I would not say that what they were doing was necessarily in compliance with the agreement that they had signed amongst themselves.
Q. But whatever it was, the FTC decided it was not serious enough to warrant further action by the FTC, or any action by the FTC; is that right?
A. We did not recommend that the commission take action. As I stated, that does not mean that there wasn't a violation. It just meant that at that particular time it was not as serious as other things that we were pursuing.
Q. And if it had been serious, the FTC would have taken action?
A. Not necessarily.
Q. Now, you've testified earlier that you were at the FTC when the Barclay case was brought in the District Court to challenge the one milligram tar claim, correct?
A. Correct.
Q. All right. And you were the lead lawyer for ad

practices --
A. Correct.
Q. -- for the government, correct?
A. Correct.
Q. Okay. Now, R.J. Reynolds and Philip Morris complained to the FTC about the tar and nicotine ratings for Barclay cigarettes; isn't that correct?
A. Yeah. It may have been -- I think it may have been that Reynolds complained and Philip Morris joined, but by the end, they both had complained to the Federal Trade Commission.
Q. Let me show you what we've marked as Exhibit 94.

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(DFT. EXH. 94, 1983 RJR Submission to FTC, was marked for identification.)

BY MS. PARKER:

Q. Exhibit 94 is a letter from R.J. Reynolds to the FTC dated June 1, 1981, correct?

A. Correct.

Q. And in that letter R.J.R. proposed that the FTC change the cigarette holder on the FTC smoking machine because the new holder, quote, would achieve measurements for Barclay cigarettes that are more reliable than can now be obtained on the FTC testing apparatus, correct?

A. Correct.

Q. And Reynolds concluded in that letter, and you

can look at the last page of it, in the summary that, "The current FTC holder is not capable of accurately measuring Barclay tar delivery," correct?

A. Correct.

Q. Now, R.J. Reynolds and Philip Morris are competitors of B&W, correct?

A. Correct.

Q. And you've seen the opinion issued by the United States District Court for the Western district of Kentucky in the Barclay litigation, correct?

A. Is it Western, the Louisville case?

Q. Yes.

A. In which Brown & Williamson asked for an injunction?

Q. Have you seen that opinion?

A. Yes, I haven't seen it recently, but I -- I'm familiar with it.

Q. Well, let me show you a copy, Exhibit 95.

(DFT. EXH. 95, Brown & Williamson v. FTC, 9/27/82 Order & Memorandum, was marked for identification.)

BY MS. PARKER:

Q. Is that the opinion that you're familiar with?

A. There was a TRO.

Q. All I'm asking you is, are you familiar with

the --

A. I'm familiar with this exhibit.

Q. Okay. Well, look on page 2, the next to last paragraph, it begins, "The Court is well aware"; do you see that?

A. Yes.

Q. Okay. The opinion states that, "The Court is well aware that the cigarette industry is fiercely competitive"; do you see that?

A. Yes.

Q. Okay. Do you agree with that statement?

A. That it's fiercely competitive?

Q. Yes.

A. Factually. I wouldn't want to make a statement on legal grounds.

Q. All right. Well, let me ask you to look at your brief that you filed that we marked as Exhibit 2 in this case.

A. If I've got these in order, I might be able to find them.

Two, okay.

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Q. Exhibit 2.
A. Got it.
Q. Okay. Let me ask you, if you will, to look at page 8, and in particular, footnote number 7. And by the

way, this is the brief that has your name on it --
A. Right.
Q. -- right?
Okay. Footnote number 7 says, "As Philip Morris has pointed out, Brown and Williamson's competitors would be forced to," and it goes on and on, so in your brief that you filed in that case, you noted the fact that R.J.R., Philip Morris, and Brown & Williamson are competitors, correct?
A. Right. You asked me about fiercely competitive. We've now changed to competitive?
Q. That's the language you used, I'm asking you --
A. They're competitors.
Q. All right. Now, the D.C. opinion, which has been marked as Exhibit 69, if you could go back to that, please?
A. Yeah, actually -- give me a second to put these in order, the ones that I just got today, they are out of order. I'm sorry; it's what number?
Q. 69.
A. Is there a 65, by the way?
Okay. I have it.
(Videographers changed from Charles Edmonds to Bill Smith.)
BY MS. PARKER:

Q. Do you have Exhibit 69?
A. Yes.
Q. All right. Let me ask you to look at page 3.
A. Yes.
Q. All right. The first full paragraph over on the left-hand column, now, in this opinion, "The District Court that considered the Barclay case noted that both Reynolds and Philip Morris," and the word they used was, complained about the Barclay filters, and that the FTC, therefore, examined studies from both B&W and its, quote, competitors, correct?
A. On the right-hand column or the left-hand column.
Q. Left-hand column, first full paragraph.
A. Yes.
Q. And, then, let me show you now the opinion of the Court of Appeals, and that has been marked as Exhibit 96.
(DFT. EXH. 96, District Court of Appeals Opinion in Barclay, was marked for identification.)
THE DEPONENT: Which Court of Appeals?
BY MS. PARKER:
Q. It says the United States Court of Appeals for the District of Columbia --

A. Okay.
Q. -- Circuit.
A. Okay. There was a Court of Appeals decision in

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the 6th Circuit as well.
Q. You've seen Exhibit 96 before today; haven't you?
A. Yes.
Q. I'm going to bring your attention to page --
A. Not in this form, but I've seen it.
Q. -- 37, which is actually page 3, right-hand column, first paragraph, it begins, "Shortly"; do you see that?
A. Uh-huh.
Q. This Federal Appellate Court found that, "Two of B&W's competitors, the R.J. Reynolds Tobacco Company and Philip Morris, Incorporated, complained to the FTC that the one milligram tar claim was inaccurate and misleading"; do you see that?
A. I see that.
Q. And also in Monograph 7, just -- of course, one of the documents that you're relying on here in this case, it was noted that competitors complained to the FTC that Brown & Williamson Barclay brand cigarette did not test accurately with the FTC test method?
A. Are you talking about Lee Peeler's --

Q. The monograph, Monograph 7.
A. I know, but where in it?
Q. Without my showing you the document, can you answer the question?
A. Well, I can't tell you that's exactly what they said. I agree that two of the competitors complained about Barclay cigarettes, and I assume Lee Peeler would have said that, but without seeing it, I don't want to say yes or no without --
Q. And as a result of the complaints by Reynolds and Philip Morris, the FTC opened an investigation and subsequently filed a lawsuit, correct?
A. Yes.
Q. And the subject of R.J.R.'s complaint to the FTC was the Barclay cigarettes' filter design, correct?
A. Basically, yes.
Q. Okay. And the District of Columbia, District Court, the Federal Court there in Washington, found the claim of one milligram tar conveyed a different message than 99 percent tar-free; isn't that correct?
A. Court of Appeals?
Q. No, District Court.
A. District Court. Which is what number? I know they found one percent -- one milligram deceptive and 99 percent not deceptive.

MR. PATRICK: 69.
THE DEPONENT: 69, okay.
BY MS. PARKER:
Q. So you agree that the Court found that the one milligram tar claim was misleading, but the 99 percent tar-free claim was not; is that correct?
A. That's my recollection. Let me just check to make sure.
Q. Okay.
A. "Has failed to show that the 99 percent tar claim unaccompanied by the 1 milligram tar claim is also deceptive."

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Q. The Court found that the 99 percent tar-free claim was just a general low-tar claim, correct?
A. Yes, they said, "The evidence clearly shows that consumers do not perceive the 99 percent tar-free claim as an assertion that Barclay has a particular milligram rating, even when accompanied by a specific milligram rating as in the current ads. The consumers have difficulty even relating the claim to any milligram number.
"Furthermore, this Court" --
COURT REPORTER: I'm sorry; could you slow down?
THE DEPONENT: I'm sorry; where did you lose

me?
COURT REPORTER: Furthermore.
THE DEPONENT: "There is little support for the FTC's view that consumers understand the claim to assert that Barclay is among the lowest rated cigarettes," and so on.
BY MS. PARKER:
Q. You're looking at Exhibit 69?
A. Yep, page 6, under C, "Barclay's 99 percent tar-free claim," paragraph 5.
Q. Now, the FTC has not challenged any other cigarettes on the ground that their design might also produce misleading results under the FTC test method, has it?
A. You mean brought a complaint?
Q. Not challenged.
A. Not challenged. That the design -- could you read it again?
Q. The FTC has not challenged any other cigarettes on the grounds that their design might also produce misleading results under the FTC test method, correct?
A. I think that's correct.
Q. Okay. Now, during the course of the litigation, Brown & Williamson alleged that recent scientific evidence demonstrates that the FTC system is so flawed that it is,

itself, deceptive; isn't that correct?
A. If you could quote me -- point me to it, it was certainly in the vain of what they were saying, but I can't tell you if that's their exact words. They trashed the system.
Q. All right. Well, let me ask you to look at Exhibit 90, which is the District Court opinion -- I'm sorry 69, Exhibit 69, if you'll look at page 3.
A. Okay.
Q. Do you see that, the first paragraph on the right-hand column? It says, "B&W contends that recent scientific evidence demonstrates that the FTC system is so flawed that it is, itself, deceptive."
A. Correct.
Q. Do you see that?
A. (Moves head up and down.)
Q. And that's what B&W alleged during that lawsuit, correct?
A. They did.
Q. So the FTC was put on notice in 1983, by B&W, that, "Recent scientific evidence demonstrates that the

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FTC system is so flawed that it is, itself, deceptive," correct?
A. That's correct.
Q. But you disagreed with Brown & Williamson on

that point in the litigation, correct?
A. They failed to put --
Q. No, my question is, you disagreed with Brown & Williamson in the litigation with respect to that point, correct?
A. The commission's position in that litigation was that that statement was not entirely accurate.
Q. Okay. And the FTC's position in the litigation was that the rating -- that its rating and test method was accurate as a comparative measure of tar and nicotine, correct?
A. Was accurate -- that it had elements that were useful.
Q. Well, then it was accurate. The FTC took the position in this litigation that it's rating and test method was accurate as a comparative measure of tar and nicotine; isn't that true?
A. As a machine measure of tar and nicotine? Yes.
Q. As a rating and test method.
A. We described it in many different ways. I'm not sure if we described it exactly that way. I know we talked about smoke delivered to the mouth, I know we talked about machine measurements, I know we talked about higher is higher than lower, but I'm not sure we used those words. We might have, but I don't have a

recollection.
Q. The FTC never did anything to change its testing method to reflect B&W's concerns, did it?
A. You said it did nothing. They did not modify the procedure, they sure did try, but they failed at trying. They issued a Federal Register notice, they accepted comments, they tried a second time, in '94 they tried, again in '90 whenever the Federal Register notice -- they have -- they have tried.
Q. But they have never changed it, correct?
A. They have never changed it.
Q. All right. Let me show you now what we're marking as Exhibit 97.
(DFT. EXH. 97, Pillsbury Affidavit, was marked for identification.)
BY MS. PARKER:
Q. And that's an Affidavit of Harold Pillsbury that was filed in the Brown & Williamson case, correct?
A. Yes.
Q. You have seen this Affidavit before today, haven't you?
A. Yes.
Q. And Mr. Pillsbury was director of the FTC smoking laboratory during the time that the lawsuit against Brown & Williamson was pending, correct?

A. Mr. Pillsbury was the only director of the FTC laboratory from its beginning to its end.
Q. Now, on page 1, under paragraph number 2,

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Mr. Pillsbury noted that the FTC method, quote, determines the relative tar yield of cigarettes, correct?
A. By smoking them in a standardized fashion on the machine.
Q. Mr. Pillsbury, on page 1 of his Affidavit, noted that the FTC laboratory determines the relative tar yield of cigarettes, correct?
A. Without more? No. The relative tar yields of cigarettes by smoking them in a standardized fashion on a machine.
Q. So Mr. Pillsbury recognized that the FTC method did not give actual intake, but instead gave just a relative comparison of intake among different brands, correct?
A. I have to read this to see if he would have gone that far. He was a chemist, and I don't know if he would have made statements about actual delivery or not. He would have made -- I can read the whole thing to determine if that's what he said.
Q. Let me bring your attention to page 2.
A. Okay.
Q. The last sentence of the paragraph that began on

the prior page, Mr. Pillsbury wrote in his Affidavit, "All cigarettes are smoked under these standardized conditions, because the manner in which a cigarette is smoked affects its tar and nicotine delivery." That's what he said, correct?
A. That's what he said, yes.
Q. So in 1983, the FTC also knew that a smoker could get more or less tar and nicotine than the results from the FTC method, depending on how they smoked their cigarettes, correct?
A. Are you asking me if that statement is correct or if Mr. Pillsbury said that?
Q. I'm asking you if you agree that in 1983, the FTC knew the information that Mr. Pillsbury has contained in his Affidavit, that a smoker could get more or less tar and nicotine than the results from the FTC method, depending on how they smoked their cigarettes?
A. I would agree that Mr. Pillsbury said the sentence that he said. I would agree that the staff of the Federal Trade Commission knew that how you smoked affected the delivery and that you could get more or less. I wouldn't want to put all of those together in one sentence. Mr. Pillsbury is a chemist, and his capacity was as a director of the lab.
Q. The FTC knew, in 1983, that a smoker could get

more or less tar and nicotine than the results from the FTC method, depending on how they smoked their cigarettes, correct?
A. I said --
MR. PATRICK: Objection.
THE DEPONENT: I said that was true of both the staff and the commission as exhibited by things they would have said or written.
(DFT. EXH. 98, Snyder Affidavit, was marked for identification.)
BY MS. PARKER:
Q. Let me show you now Exhibit 98. This is an

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Affidavit in that same lawsuit by Wallace Snyder. Have you seen this Affidavit before today?
A. Yes.
Q. Okay. And Mr. Snyder was the associate director for Advertising Practices in the Bureau of Consumer Protection at FTC?
A. Correct.
Q. And he was your boss at the time this Affidavit was prepared, right?
A. Correct.
Q. Now, Mr. Snyder had been responsible for the FTC investigation concerning Barclay since the investigation had begun in June of 1981, correct?

A. Correct.
Q. And this Affidavit gives a fairly detailed account of the factual background of the investigation beginning with the initial date of that investigation, correct?
A. Without looking, I can't tell you positively, but that's my recollection, was that his Affidavit served to bring the history in.
Q. All right. Let me ask you to look over toward the end of that exhibit. There's an index, a list of exhibits; do you see that?
A. Correct.
Q. There are 93 exhibits that were also submitted along with Mr. Snyder's Affidavit, correct?
A. They were attached to his Affidavit, yes.
Q. Okay. Now, let me show you one of those exhibits, which was number 17 to the Affidavit, and that we are marking in this case as Exhibit 99.
(DFT. EXH. 99, Exhibit 17 to Snyder Affidavit, was marked for identification.)
BY MS. PARKER:
Q. Now, this is a letter from Abe Krash, who is counsel for Philip Morris?
A. Correct.

Q. And it was sent to the FTC, dated August 18, 1981, correct?
A. Correct.
Q. Have you seen this letter before today?
A. Yes, I don't remember what it said, but I've seen it.
Q. Okay. The subject of the letter shown there on page 1 is "Investigation of Barclay Filter," correct?
A. Correct.
Q. Okay. If you look at the first full paragraph on page 2, "Philip Morris is encouraging the FTC to take prompt action on the Barclay matter," correct?
A. Correct.
Q. Okay. Let me show you now what we've marked as Exhibit 100.
(DFT. EXH. 100, Exhibit 18 to Snyder Affidavit, was marked for identification.)
VIDEOGRAPHER: Let me go off the record to change tapes for just a minute. Off at 5:20.
(Off the record.)

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VIDEOGRAPHER: Back on the record at 5:21.
BY MS. PARKER:
Q. Now, I've shown you or handed to you Exhibit 100, and that is Exhibit 18 to Mr. Snyder's Affidavit, and it's a letter from Liggett and Myers Tobacco Company to the FTC, dated August 19, 1981, correct?

A. Well, can I attest to the fact that that's the letter. If I have to attest to the fact that it's Exhibit 18, I'm going to have to go back and check it.
Q. Well, you can look at the index if you want to.
A. Okay.
Okay.
Q. Do you agree it's Exhibit 18?
A. It seems to be, yes.
Q. Okay. Have you seen this letter before today?
A. I would have read the entire file at one time.
Q. Now, in the letter that we've just marked there as Exhibit 100, on page 1, Liggett and Myers Tobacco Company states that it is, quote, firmly convinced that it is impossible to define a normal human smoker or a normal human puff of a cigarette for the purpose of constructing a representative testing machine holder, much less a cigarette testing machine which would equate with human smoking. Do you see that statement?
A. I do.
Q. So Liggett and Myers Tobacco Company was telling the FTC, back in 1981, that no method, including the existing FTC test method, can measure actual intake of smokers, correct?

A. Can I have a second on that question?
Q. Sure. I'll ask it again.
A. I can read this. Just the question, Liggett was taking the position that --
Q. Liggett was telling the FTC, back in 1981, that no method, including the existing FTC test method, can measure the actual intake of smokers, correct?
A. Well, I have to read this. I don't know whether they're just commenting on the fact that the holder doesn't replicate the mouth, vis-a-vis the Barclay matter, or the whole methodology.
Q. Well, let me bring your attention, then, to the rest of that paragraph, it says, "For instance, velocities, puff durations and puff volumes vary significantly from smoker-to-smoker. In view of such variations, and particularly with low-tar and ultra low-tar cigarettes in today's market which utilize various methods of air filtration, the puff characteristics of such systems can show even greater variances, depending on how the smoker handles his or her cigarette. In addition, the smoke yield of air-diluted cigarettes can be significantly affected by such factors as lip pressure, lip positioning, and by the positioning of the fingers holding the cigarette." Do you see that?
A. Uh-huh.

Q. So Liggett is telling the FTC, back in 1981, about compensation, also; isn't that true?
A. The letter is saying that you can't replicate

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the way an actual smoker smokes. It does appear to continue to --

Q. Liggett is talking about compensation; isn't that true?

A. It's talking about compensation, but not compensation that discredits the entire system. It is writing this letter to say that it doesn't believe that the commission's investigation will yield an answer to the issue of individual variation, and that, therefore, the system should stay as is and should not be modified.

Q. Well, look on page 1. Liggett says, "We are firmly convinced that it is impossible to define a normal human smoker or a normal human puff of a cigarette for the purpose of constructing a representative testing machine holder, much less a cigarette testing machine which would equate with human smoking."

So Liggett was saying that they're firmly convinced that it was impossible to define such a testing machine, correct?

A. Correct. They're not making a statement about the procedure; they're making a statement about the compensatory behavior.

I mean, unlike the position taken by Brown & Williamson, which is that the whole system was flawed. They are saying you can't fix this one thing. I think on the second page they said they agree that the proposal discourages innovation in the competitive marketplace, and those do not merit the commission's serious consideration and the diversion of its resources.

It seems to be saying keep, you know, keep the test, but don't fix it for this because you can't; you can't fix it for this problem.

Q. Let me show you what we've marked as Exhibit 101.

(DFT. EXH. 101, Exhibit 19 to Snyder Affidavit, was marked for identification.)

BY MS. PARKER:

Q. Now, Exhibit 101 is another Exhibit to Mr. Snyder's Affidavit, in particular it's Exhibit 19 to Mr. Snyder's Affidavit, and it's a letter from R.J. Reynolds Tobacco Company to the FTC, dated August 20, 1981, correct?

A. Correct.

Q. Have you seen this letter before?

A. I'm sure.

Q. Pardon me?

A. I'm -- as I said, I read the whole file.

Q. Let me bring your attention to page 6 of the letter. Reynolds was urging the FTC -- have you got there? -- to take immediate steps to correct its testing methodology which permits the erroneous advertising of the Barclay as a one milligram tar cigarette; do you see that?

A. This is on page 6?

Q. Page 6.

MR. PATRICK: The letter.

THE DEPONENT: I've got the wrong page 6. Okay.

BY MS. PARKER:

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Q. So Reynolds was urging the FTC to take immediate steps to correct its testing methodology which permits the erroneous advertising of the Barclay as a one-milligram tar cigarette; do you see that?
A. That says that.
Q. So Philip Morris and Reynolds told the FTC that, "The FTC method was inadequate and that changes should be made immediately," correct?
A. Philip Morris and R.J. Reynolds were saying that the system was inaccurate as far as the cigarettes were concerned, in that the methodology had to be changed to test Barclay, but not anybody else.
Q. And Liggett was telling the FTC that the FTC

method does not provide a measurement of actual intake of tar and nicotine and was telling the FTC about compensation, correct?
A. Liggett seemed to be saying, Don't make any changes for the -- the system is the system.
Q. Okay. Let me ask you, then, to look at page 7 of the submission that's attached as that same exhibit, which is number 101.
A. 7 of the attachment to the attachment?
Q. Yes.
I'll tell you what might be easier, if you'll just look at the seventh page of the document.
A. It's not page 7?
Q. It's the seventh page of the document.
A. Seventh page of which document?
MR. PATRICK: Which document?
THE DEPONENT: Are you talking about this whole pile here; page 7, including the cover that says Volume 2?
BY MS. PARKER:
Q. Yes.
A. And that says, "Comments by R.J. Reynolds Tobacco Company on material submitted to FTC by competitive companies regarding the Barclay complaint."
Q. Yes. Have you seen this submission before?

A. I'm sure that I saw it at the time.
COURT REPORTER: I'm sorry?
THE DEPONENT: Yes.
BY MS. PARKER:
Q. Now, R.J. Reynolds attached an article written by Jack Henningfield and Roland Griffiths entitled "Effects of Ventilated Cigarette Holders on Cigarette Smoking by Humans."
A. Really? I'm sorry. I'm sorry; continue, I'm sorry.
Q. As part of these comments --
A. Uh-huh.
Q. -- that R.J. Reynolds submitted, R.J. Reynolds attached an article written by Jack Henningfield and Roland Griffiths, correct?
A. Yeah, I would have read it at the time and did not know I had gotten an article from Jack at that time.
Q. Okay. And the article is entitled, "Effects of Ventilated Cigarette Holders on Cigarette Smoking by Humans," and it had been published in 1980 in Psychopharmacology, correct?

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A. Correct.
Q. Now, you know Dr. Henningfield, of course?
A. I do.
Q. Okay. And do you also know Dr. Griffiths?

A. No.
Q. Now, look at page 118 of the article.
A. I'd sure like to read the abstract first, but --
Q. Do you see the section that says Discussion?
A. Okay.
Q. The part of the second sentence says, "The increased rates of puffing per session resulted in compensation for the decreases in concentration of tobacco product delivered per puff"; do you see that?
A. I see that.
Q. So the authors of this article, that's Dr. Henningfield and Dr. Griffiths, are discussing compensation, correct? That's the word they used, right?
A. You know, they used the word "compensation."
Q. All right. Let me -- let me ask you if you'll look at the next article --
A. Right after.
Q. -- that's attached to the Reynolds' submission, and that's a chapter from a publication called Smoking Behavior and the authors are Dr. Crayton and Dr. Lewis. Do you know Dr. Crayton and Dr. Lewis?
A. I haven't been able to find this yet. Is this --
Q. It's just a few pages over. It says, "The

effect of different cigarettes on human smoking patterns." Do you see it?
A. Matsukura?
COURT REPORTER: I'm sorry.
THE DEPONENT: Is this the Matsukura article?
BY MS. PARKER:
Q. This is an article -- Chapter 22, "The Effect of Different Cigarettes on Human Smoking Patterns."
A. But is it after the Matsukura, which is directly after Henningfield?
MR. PATRICK: Yeah.
MS. PARKER: Yes.
BY MS. PARKER:
Q. Do you see that article?
A. Yes, I do.
Q. Okay. Do you know Dr. Crayton and Dr. Lewis?
A. Not personally. I'm sure I read this article.
Q. And this was an article that was submitted by R.J. Reynolds Tobacco Company to the FTC, correct?
A. Assuming that this is still the way it was submitted, yeah.
Q. All right. If you look midway down page 1 of the study, the authors noted that, "There is a considerable body of evidence." Do you see where I am?
A. No.

Q. Okay. Midway down the page.
A. Under Introduction.
Q. Yes.

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A. Okay.
Q. It says, "However --
A. Okay --
Q. -- there is a considerable body of evidence."
A. -- if you want to point me to something, give me the first word in the sentence, it makes it easier for me to find it.
Q. I said that, "However."
A. Okay. I didn't hear that the first time.
Q. Do you see where I am?
A. I do now.
Q. Okay. "However, there is a considerable body of evidence that shows that smokers alter their smoking patterns when they change to a brand of cigarettes with different delivery characteristics. If a smoker of relatively high-delivery cigarettes changes to a brand with substantially lower deliveries, he may actually increase his intake of tar and carbon monoxide in his attempts to compensate for the reduced delivery of nicotine." Do you see that?
A. I see that.
Q. So Dr. Crayton and Dr. Lewis, in this article,

are also discussing compensatory smoking, correct?
A. There were lots -- yes, they are, and there were lots of articles discussing these.
Q. Okay. Now, the FTC had received these articles no later than 1981 when Reynolds provided them to the FTC, correct?
A. Correct.
Q. And, in fact, the FTC, in turn, submitted these articles to the Court through its own Affidavit in the case, correct?
A. You mean other than through this?
Q. Correct.
A. You mean we took this out and submitted it separately or we --
Q. The FTC submitted these articles to the Court through its own Affidavit, correct? Do you know one way or the other?
A. Well, if what you're asking is, did the commission, through Snyder's Affidavit, attach the historical documents --
Q. Yes.
A. -- that they had received --
Q. Yes.
A. -- including the attachments to those documents? The answer is yes.

Q. So the FTC, in effect, adopted these articles in support of its position in the Barclay case?
A. Well, they may or may not have, but certainly not by attaching to Wally Snyder's Affidavit they didn't adopt them.
Q. The FTC forwarded these articles to the Court, correct?
A. Sure, one of the things the FTC had to tell the Court is how it had conducted its -- how it conducted its investigation. Wally Snyder's Affidavit told them how they conducted the investigation, what documents came in, what documents came out.

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I don't think that by attaching them they said that every -- I mean, that would be the same as saying that they believed everything that was said in R.J.R.'s submission, everything that was said in Brown and Williamson's submission. These are historical documents.

Q. Now, you don't dispute, do you, that the FTC was aware about compensation in 1981, correct?

A. No, I'm not disputing that, but that isn't what you asked me. You asked me if they adopted this as their conclusion -- I mean, were they vouching for this.

When you ask me was the commission aware, again, I'd have to say that you've got five commissioners, you've got -- you've got staff, and when you talk about "aware,"

you have to talk about what that awareness means. I mean --

Q. Well, the commission --

A. -- I don't have any problem with the statement. I just want to make it clear that I don't feel you can talk about the commission as this monolithic -- the commission has an opinion, the commission believes, the commission knows.

The commission is made up of lots of different people, and knowledge can be imputed to it in various ways, and you're not distinguishing those. And that's really all I have to say.

Q. So if there's a big organization, there might be an individual who has a particular view that is his or her own individual view, but that's not the view of the organization; is that what you're saying?

A. No. In 1981, Philip Morris and R.J.R. would have come to the commission staff and the Division of Advertising Practices and said, We have a problem. The commission staff would have received the evidence. The commission staff would have made recommendations to the commission. When the -- when the commissioners themselves knew something, what they knew, and how they knew about it can only be seen by what they write.

If you're talking about different peoples within

the commission? Then, yes, there were people in the commission who definitely had an awareness of compensatory smoking in 1981. I couldn't tell you what the commissioners knew about compensatory smoking in 1981.

(DFT. EXH. 102, Exhibit 51 to Snyder Affidavit, was marked for identification.)

BY MS. PARKER:

Q. Now, what we've marked as the next exhibit, which is Exhibit 102, is Exhibit 51 to Mr. Snyder's Affidavit, and that is Dr. Lynn Kozlowski's report on Barclay that was submitted to the FTC in 1982, correct?

A. Correct.

Q. And Dr. Kozlowski was an expert consultant for the FTC in this Barclay litigation, correct?

A. Correct, the way they conducted this investigation is that they asked for recommendations and approval from the parties who were involved. It was a very unusual procedure.

Q. Now, attached at the end of Dr. Kozlowski's report is an article that he wrote that's called,

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"Applications of Some Physical Indicators of Cigarette Smoking," that had been published in 1981, in a journal called Addictive Behaviors, correct?

A. The last thing -- it's not the last article attached, right?

Q. I said it's at -- well, it's at the end of the report.

A. Well, at the very end of the report is "Perceiving the Risks of Low-yield Ventilated-filter Cigarettes: The Problem of Hole-blocking."

Q. Do you see the article?

A. No, I don't. I mean, if you could tell me where to find it.

Q. This is at the very end of his report, not the very end of the Affidavit.

A. At the end of his report.

He says he has two parts to the report. The first or the second?

"Applications of Some Physical Indicators of Cigarette Smoking."

Q. Do you see that article?

A. Uh-huh.

Q. All right. Look at page 1, in the Abstract Section. The sentence that begins with the word "Unfortunately"; do you see that?

A. Yes.

Q. Dr. Kozlowski wrote that, "Unfortunately, machine-smoked yields are poor predictors of a smoker's exposure to the toxic secret ingredients in tobacco. Many smokers who smoke low-yield cigarettes are not actually low-yield smokers, in that they use any of a number of compensatory smoking techniques to increase the yields of their cigarettes." Did I read that correctly?

A. Yes.

Q. And that's what he said in the article?

A. Yes.

Q. Okay. That was page --

A. 213.

Q. -- 213. Let me ask you to look at the next page, which is page 214. And he states there, in the first full paragraph, fourth line that "The standard smoking machine essay, such as the FTC method, provides an inadequate model of human smoking behavior for three main reasons"; do you see that?

A. I do.

Q. Okay. And he says "First, as has been alluded to above, smokers tend to compensate for low yields by altering their way of smoking low-yield cigarettes," correct?

A. Yes.

Q. And then he says, "Second, through the standard parameters -- no, though, I'm sorry. Let me start over.

"Second, though the standard parameters are meant to represent the average smoker, the standard settings underestimate how the average smoker smokes a modern cigarette." Do you see that?

A. I do.

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Q. And then he goes on to say, "Third, human smoking behavior is too variable to be adequately represented by an average smoking regimen"; do you see that?
A. I do.
Q. So Dr. Kozlowski is explaining in this study that essentially the FTC's method does not provide an adequate basis for measuring actual tar intake, because it does not take into account compensation, and it can not measure the individual smoker?
A. Well, the first one says, his first point is that it doesn't measure -- it doesn't take into account --
Q. Compensation.
A. -- compensation.
His second point is that he's not talking about an individual anymore. He's saying it doesn't represent an average, because it isn't what an average smoker smokes. That's a debate, as to what does an average smoker looks like? Is it 35 millimeters -- milligrams, is it 50? So that one goes towards an average.
And the third one goes back to the issue of compensation, which he notes is a very new issue and

should be studied some more.
Q. So you agree that that's what he said?
A. With the caveats that I put in, yes.
Q. Let me ask you to go back to the first page of that article, page 213. The very last paragraph, fifth line of that paragraph begins with -- the sentence begins with the word, Although; do you see that?
A. Yes.
Q. Okay. Dr. Kozlowski wrote that "Although the words on cigarette packs and advertisements appear to indicate the dose of tar and nicotine to be found in a cigarette, smokers can easily double or triple yields beyond the nominal levels by taking more frequent, larger, or higher velocity puffs"; do you see that?
A. I do.
Q. And it goes on, the very next sentence, to say, "Even the lowest yield cigarettes on the market, i.e., less than or equal to 6 milligram of tar, .6 milligrams of nicotine can deliver two times as much nicotine, three times as much tar, and about four times as much carbon monoxide if a smoker simply holds these ventilated-filter cigarettes three or four millimeters farther back in the mouth, thereby defeating the purpose of the vents with his or her lips"; do you see that?
A. I do.

Q. Okay. And in that paragraph, Dr. Kozlowski is talking about compensatory smoking, correct?
A. He's talking about some forms of compensatory smoking.
Q. And he states that smokers of low tar -- low-nicotine cigarettes actually can receive more tar, more nicotine than the FTC numbers listed on the packs, correct?
A. Did he say "listed on the packs"?
Q. It says, "Although the words on cigarette packs and advertisements."
A. Because it's not on most cigarette packs; it is

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in the ads.
Q. Well, that's what he says there; isn't that correct?
A. He says, "on packs and advertisements."
Q. Okay.
A. That's a yes.
Q. And the FTC had this article by Dr. Kozlowski along with the rest of his submission, correct?
A. Yes.
Q. All right. Now, also attached, as part of Dr. Kozlowski's submissions to the FTC, was a paper that was titled, "Perceiving the Risk of Low-tar Ventilated-filter Cigarettes, The Problem of Hole

Blocking," that he wrote, correct?
A. How much further beyond this article is it?
Q. Yeah, you need to keep on turning.
A. Perceiving the risks of low-yield -- how is this different from the last one? It has the same title?
Q. Well, that's a paper that's presented at the International Workshop on the Analyses of Actual Versus Perceived Risk that had been presented on June 2nd, 1981, correct?
A. Well, they appear to be the same thing. Hum, I wonder why they're both there?
You want the first one, though, right?
Q. Well, I'm asking you if you see this paper?
A. Well, I'm saying I see it twice. So I'm asking if you want to ask --
Q. Do you see two documents in there, one is the -- the -- what we've gone over already, which was the Journal article that had been published in the Addictive Behaviors Journal in 1981?
A. Okay. You asked me if I see an article called "Perceiving the Risks of Low-yield Ventilated Filter Cigarettes: The Problem of Hole Blocking."
Q. And that's a paper?
A. And what I'm telling you is I see two copies of it. Which one is it you want me to look at? The very

last thing in there -- they both appear to be presented at the International Workshop on the Analyses of Actual Versus Perceived Risk, Marvin Schneiderman, Chairman, 1981. One's got two pages per page, and one is one page per page.
Q. Do you have both of them in front of you?
A. (Indicating)
Q. Okay. Let's use the second one since it's copied straight on the page.
A. Okay.
Q. Okay. Let me ask you, again, this is a paper that had been presented at the International Workshop on the Analyses of Actual versus Perceived Risk on June 2nd, 1981, correct?
A. That's what it says. There's something at the bottom I can't read.
Q. All right. Well, if you look at the next page under the Abstract section, Dr. Kozlowski stated that, "Smokers can block the ventilation holes with their fingers or lips, and thereby increase tar, nicotine and carbon monoxide yields by several times. For example,

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from 4 milligrams to 13 milligrams tar when the standard smoking machine procedure is used"; do you see that?
A. I do.
Q. So, again in 1981, Dr. Kozlowski is talking

about hole blocking and how hole blocking can increase the amount of tar a smoker actually receives threefold over the FTC rating, correct?
A. The example he gave is threefold, yes.
Q. And the FTC had this article, this paper in 1981 as well, correct?
A. Correct.
Q. And the FTC attached both of these papers to Mr. Snyder's Affidavit that they filed in the Barclay case, correct?
A. Correct.
Q. So, again, the FTC was clearly aware of hole blocking and the potential scope of compensation by smokers in 1981, correct?
A. Correct.
Q. Now, let me show you what we're marking as Exhibit 103.
(DFT. EXH. 103, Exhibit 73 to Snyder Affidavit, was marked for identification.)
COURT REPORTER: Counsel, can we go off the record to change paper?
MS. PARKER: Sure.
VIDEOGRAPHER: Off the record at 5:50.
(A recess transpired.)

VIDEOGRAPHER: On the record at 5:54 p.m.
BY MS. PARKER:
Q. Ms. Wilkenfeld, we marked as Exhibit 101 --
A. 101 or 3.
Q. I'm sorry, 103 -- another exhibit to Mr. Snyder's Affidavit, and this is Exhibit 73 to his Affidavit, and it's called, "Statement of Commission Action, Barclay investigation, P814511," correct?
A. Yeah.
Q. And this was the determination made by the FTC that the present FTC method did not adequately measure Barclay cigarettes, correct?
A. Yes.
Q. Okay. And it's dated July 2, 1982, correct?
A. Correct.
Q. Okay. Did you have any involvement --
A. No.
Q. -- in the preparation of this document?
Have you seen it before today?
A. Yes.
Q. Now, let me ask you to look at page 8, particularly at footnote number 5. The last sentence there states, that the commission -- well, that "The commission recognizes the existence of compensation and calls it behavior which intentionally or not, enables

smokers of lower tar cigarettes to increase tar delivery," correct?
A. That's what it says. I'm sorry; did you --

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Q. My question was, there, on footnote number 5, the commission recognized the existence of compensation?
A. It says it's going to discuss it below, so I presume it gets into that in more detail.
Q. Well, the commission recognized the phenomenon of compensation?
A. Absolutely.
Q. And on page 12 of this same document, the third paragraph that begins, "B&W is correct"; do you see that? Do you see that?
A. Yeah; I'm sorry.
Q. Okay. On page 12 there, "The commission recognizes hole blocking as one form of compensation," correct?
A. Correct, yes.
Q. So, clearly, the FTC did know about compensation no later than 1982, when it issued this determination, correct?
A. Correct.
Q. All right. Now the FTC's theory in the Barclay case was not based on compensatory smoking, correct?
A. You mean as to --

Q. As to Brown & Williamson.
A. As to Barclay, itself?
Q. Yes.
A. Was not based on compensatory smoking? Well, it was based on the fact that the filter -- I don't want to use the word "cheated," because I didn't like that -- that the filter could not be accurately tested on the machine.
We did not call the behavior -- you know, I mean, I don't want to say it wasn't a part of the case. It wasn't the allegation. The allegation was that the filter itself was the problem.
Q. Okay. So it was not the allege, then, by -- of the FTC?
A. Well, the problem is that the filter produced one of two effects. It could be called lead lips or beefy lips, and lead lips or beefy lips -- lead as in lead, beefy as in -- would be compensatory type of behavior, but we said that it was the filter that caused that behavior to make the machine measurement inaccurate.
Q. Let me see if I can understand your testimony. So in the Barclay case, the FTC knew about compensatory smoking at the time, but it did not assert compensatory smoking as its theory, and instead the theory was based on the fact, as I understand your testimony, that the Barclay filter would result in a tar yield that when compared with

other one milligram cigarette smoked in the same manner would not be accurate?
A. Well, the theory was an evolving concept as new evidence came in. But the -- but the theory would be that whatever behavior smoker's engage in, that was true for all cigarettes.
What was different about the Barclay cigarette was that the consumer could not smoke the Barclay cigarette the way the machine did. We believed at that time that a consumer could have smoked a cigarette the same way the machine did if it wanted -- if he or she wanted to. But that a human could, literally, not smoke

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the Barclay cigarette the way the machine did because of this lead lip or beefy lip problem, that the actron filter prevented -- made it impossible for a human to smoke it in the same fashion as the machine.

Q. Now, with the exception of adding the carbon monoxide issue back in 1980, the FTC has never changed its testing method procedure for tar and nicotine, correct? And I'm asking only about the procedure.

A. When you pulled out documents from the '70s that I wasn't aware, so I'm sort of uncomfortable to say absolutely anything anymore. You know, they were not relevant to my work in the '80s, but my understanding was that whatever tweaks or changes were made did not modify

the procedure.

Q. So to date, the FTC has not decided to change the way the cigarettes are tested, correct?

A. Oh, it's decided to change it; it hasn't figured out how to change it. I think its Federal Register notice indicates that it has decided to change it.

Q. Let me restate my question again. Okay. To date, the FTC has not changed the way cigarettes are tested, correct?

A. With the caveat of the carbon monoxide.

Q. With the caveat of the carbon monoxide.

A. And the additional caveat that they don't test it anymore.

Q. Correct?

A. I think so, I'm not sure.

Q. And to date, the FTC has not changed the way the FTC results are reported, correct?

A. Well, yeah, they kept changing the format, they kept changing -- yeah, they changed the format.

In the beginning -- in the beginning, they had -- they gave the standard deviations, so that you could tell exactly what the range of testing results were. That was done away with sometime in the '80s, I don't know, that may have come back again. I don't know if the standard deviations are back, so there have been lots of

different ways of reporting it over time.

So if what you're asking -- well, what are you asking if not that?

Q. Let's move on to something else. In 1983, the -- we've already discussed, the FTC knew about the possibility of blocking vent holes, right?

A. I said the commission absolutely, that they mentioned it in several of their written opinions.

Q. And the FTC, at that time, also knew about the possibility of taking more puffs, more -- increased number of puffs, correct?

A. I said the FTC commissioners knew that; they stated that in these documents.

Q. Okay.

A. They didn't necessarily understand the consequences of what that meant, but they did know that that phenomenon occurred.

Q. And in 1983, the FTC also was aware of the phenomenon of smoking more cigarettes, an increased number of cigarettes, correct?

A. Again, they stated that in their documents here.

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Q. Right. And the FTC even discussed compensation with the briefs that were filed in Court --
A. Correct.
Q. -- right?

A. The briefs and the Federal Register notices and all those.
Q. Okay. And the FTC knew that because of compensation; a smoker could potentially get as much tar and nicotine from a low-tar nicotine brand as from a medium-tar nicotine brand, right?
A. That, I don't know.
Q. Well, let me -- let me -- let me ask the questions part by part?
A. Okay.
Q. And see if we can do it that way?
All right. The FTC knew that a smoker could potentially get as much tar and nicotine from a low-tar and nicotine brand as from a medium-tar and nicotine brand because of compensation, right?
A. Actually, it's the first part of the sentence that I don't know. I don't know if they thought in terms of low and medium.
Q. Okay. Did the FTC know that a smoker could get potentially as much tar and nicotine from a low-tar nicotine brand as from a high-tar and nicotine brand because of compensation?
A. I would say the commission knew, or at least stated, that have a smoker of a low brand could get a whole lot more tar, and perhaps as much as smokers of

higher-rated tar cigarettes.
Q. And the issue of compensation had been discussed in these studies we've gone over and in the public health community since the late-1960s, right?
A. You've showed me those studies, I don't want to --
Q. Well, we've gone over them. We've already marked them.
A. All right. That's fine. Then that stands for what --
Q. You don't dispute that?
A. That stands for what that stands for. But you follow right up on what the commission knew. Are we on another subject? Because I can't tell you what the commission knew about the studies in the '60s until -- I can tell you what the commission knew about in the '80s.
Q. Well, would you agree that the FTC staff was aware about these studies that we've gone over and with what the public health community has said about compensation since the late-1960s?
A. No, I couldn't testify to that. I don't know who was staff; I don't know what they knew.
Q. Well, let me go back now to the study that we marked previously, the Djordjevic study, which I understand has been marked as Exhibit 93, all right?

A. Her name is Djordjevic.
Q. Djordjevic?
A. I think that's how she pronounces it,

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D-j-o-r-d-j-e-v-i-c. I think it's Djordjevic. I had to practice that one.

Q. Now -- well, this study that we've marked there as Exhibit 93 is not telling the FTC or the public health community anything about compensation that they did not already know, correct?

A. Not telling them anything? Well, there was new stuff in here.

Q. Well, let me be a little bit more specific then.

A. Okay.

Q. The study that we just -- that we are talking about here that has been marked as Exhibit 93, was not telling the FTC or the public health community any new or additional information about the fact that the phenomenon of compensation exists, correct? Everybody already knew it.

MR. PATRICK: Objection. Okay. Go ahead.

THE DEPONENT: Well, I wasn't going to object. I was just going to say, it taught us a lot of new things about compensation, but it didn't tell -- it did not, for the first time, say

Eureka, there's compensation.

BY MS. PARKER:

Q. Okay.

COURT REPORTER: It did not tell us what?

THE DEPONENT: Eureka, e-u -- I don't even know how to spell it Eureka, you know. I'm not a good speller.

BY MS. PARKER:

Q. And the study that we've marked as Exhibit 93 also did not tell the FTC or the public health community anything new about the phenomenon of blocking vent holes, because that was something that was already known, correct?

A. Did it talk about vent holes, at all? I would have to read the whole thing to know if they talked about vent holes.

Under the study population, it said something about vent holes, I don't know what it said about vent holes. If it said anything about vent holes, it probably wasn't new. They probably just said --

Q. Do you know whether or not -- can you remember whether or not the study said anything about the type of compensatory smoking behavior that involved taking more puffs, increasing the number of puffs? That's something

else that's not new, correct?

A. What do you want me to answer? The first --

Q. Do you know whether or not it's in the exhibit?

A. Let me -- I can tell you if I read it.

Q. Well, I really don't even need for you to read it. I just want to know if you remember that? Do you remember whether or not it addresses it?

A. Truthfully, I'm getting very foggy.

Q. Okay. Well, let me ask it --

A. I am sure that -- I am sure that one of the things they asked the people who came in was about these various things. I know they tried to model various types

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of compensatory behavior. The fact that compensation occurred was not news. How to model it and what some of the consequences are were new.

Does that answer your question?

Q. And the information that's stated here in the exhibit that, "Although low-yield cigarettes delivered lower levels of carcinogens to the smoker than did medium-yield cigarettes"; do you see that?

A. What page?

Q. Page 110.

A. And where?

Q. Okay. Right-hand column, that paragraph, the portion of the paragraph that begins with the word,

"Although."

A. Right. Okay.

Q. I'll read the whole thing. "Although low-yield cigarettes delivered lower levels of carcinogens to the smoker than did medium-yield cigarettes, the proportional reductions expected of the former were less than would be predicted by the FTC ratings. In other words, a smoker who uses the FTC ratings to choose a brand of cigarettes with lower amounts of carcinogenic agents will not achieve the reduction anticipated"; do you see that?

A. Yes.

Q. Okay. That idea was not new to this article, correct?

A. Well, I mean, what was new is they measured BAP and NNK and those specific carcinogens.

Q. I understand that, but the general idea had been known to the FTC and to the public health community for years?

MR. PATRICK: I'm sorry; what's the general idea?

THE DEPONENT: If you're talking about tar, yes. If you're talking about specific elements, I mean, I think what they were looking at is that the composition of tar changes from cigarette to cigarette. There was that problem,

in addition to the reduction of tar. So some of that information was new.

BY MS. PARKER:

Q. Let me mark your editorial, we haven't done that yet.

(DFT. EXH. 104, Wilkenfeld Editorial, was marked for identification.)

BY MS. PARKER:

Q. And this is Exhibit 104. That's your editorial, correct?

A. Correct.

Q. Okay.

A. Well, mine and Jack's and John and David and John.

Q. All right. Well, I see your name is listed first. Does that mean that you wrote the majority of the report?

A. No.

Q. Who wrote the majority of the report?

A. This one, probably Jack wrote the first draft.

Q. Jack Henningfield?

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A. Yes, I'm sorry, Jack Henningfield.
Q. Can you tell me which portions you wrote?
A. Which portions I wrote, which portions I edited?
Q. Which portions you wrote. Did you write any of

it or did you just edit?
A. I wrote portions that -- it probably -- there would have been portions in the second paragraph, probably most of the paragraph on the second page that begins with "Finally," most of the paragraph probably that begins with "It is time for a change." By the time these things come out, they look the same. We needled each other to death.
COURT REPORTER: I'm sorry; I didn't hear you.
THE DEPONENT: We needled each other to death. But not all of it, because I can't identify which sentences would have been added.
BY MS. PARKER:
Q. All right. If you look on the first page of your editorial, over on the right-hand column, the very last paragraph that begins with the word "Thus"; do you see that?
A. Uh-huh. The paragraph that begins?
Q. With the word "Thus."
A. Oh, over there; sorry.
Q. Okay. Do you see that? All right. In the editorial, you stated that, "In support of the then current public health thinking, but ultimately, unwittingly, the FTC provided the tobacco industry with a very powerful and persuasive selling message"; do you see

that?
A. Yes.
Q. But the FTC's actions here really weren't unwitting, were they?
A. Actually, unwitting was my term, and they absolutely were.
Q. The FTC knew from the beginning, in 1967, that the FTC method did not accurately measure what level of tar and nicotine each individual smoker received; isn't that correct?
A. They did not know the extent to which the engineering of the product was causing consumers to have such radical variations in what they received.
Q. And the search --
A. They were very unwitting participants in this.
Q. And the Surgeon General noted the possibility of compensation in 1979, correct?
A. People knew about compensation. They did not know the depths and the extent of what was going on.
Q. And the Surgeon General noted the possibility of compensation again in 1981, correct?
A. Yes.
Q. And the FTC defended its test method in the Barclay suit, even though R.J. Reynolds, Philip Morris, and Brown & Williamson submitted criticisms of the FTC

test method, correct?
A. When? In '83?
Q. In 1983.

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A. I thought Brown & Williamson said, Get rid of it, and Philip Morris and R.J. Reynolds said, Keep it and just make a modification for them. So we got a lot of advice in '83; none of it turned out to be very good.
Q. And the test method was the subject of several studies; isn't that true?
A. What kind of studies?
Q. You aren't aware --
A. I don't -- that's too broad. You know, I mean, Neal Benowitz looked at the results. Are you talking about the machine, the methodology, the consequences of the results, what consumers get?
Q. Members of the public health community complained that the tar and nicotine ratings were inaccurate because of compensation; isn't that true?
A. Meaning '83? Are you asking about --
Q. At any point in time prior to the year 2000 --
A. Yes.
Q. -- don't you agree?
Okay. And let me ask you to look back at Exhibit 33 that's been marked previously. Those are hearings from 1987.

A. Sorry. I'm sorry, yes.
Q. Okay. The American Lung Association made a presentation before Congress in which it stated that the FTC's method contributed to seductive advertisements which state that lower-yield cigarettes are safer; isn't that true?
A. What page are you on; I'm sorry?
Q. Page 48.
A. 48, and what paragraph?
Q. Next to last paragraph in the first column. We believe that the Federal -- and again this is a statement by the American Lung Association.
We believe that the Federal Trade Commission's testing program may therefore have contributed to what -- they refer to "an individual" -- has caused seductive advertisements that lead consumers to believe there are less hazardous or safer cigarettes.
A. That's definitely what Munzer said, that I described as a "unwitting participant."
COURT REPORTER: That who said?
THE DEPONENT: Munzer, M-u-n-z-e-r.
BY MS. PARKER:
Q. And on page 52 of that same document, the American Heart Association commented at that same hearing that "The FTC method implicitly suggested that low-tar,

low-nicotine cigarettes are safer"?
A. Can you tell me what paragraph?
Q. Third paragraph from the bottom. "The American Heart Association believes the cigarette testing program must continue, but with major modification. Although we recognize the Federal Trade Commission's testing program did not suggest or recommend to the public that the low-tar and nicotine cigarettes are safer, there is the misperception by the public that, in fact, they are safer," as Dr. Munzer pointed out; isn't that correct?
A. Yeah, he definitely said the Federal Trade Commission program did not suggest or recommend, but that

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was the misperception that the public had, and a lot of that was due to the tobacco company advertising.
Q. And the FTC test method does not take into account compensation; does it?
A. No.
Q. And the 1989 Surgeon General's Report even suggested that, "The FTC contributed to the understanding that lower tar and nicotine cigarettes are safer," correct?
A. Do you want to let me have a copy of that?
Q. Now, you worked on the 1989 Surgeon General's Report; didn't you?
A. It's a volume this long. I can't tell you what

one sentence in the 1989 volume was. I only worked on one chapter in the 1989 volume, and it may have been that chapter.
Q. All right. Let me show you what we are marking as Exhibit 105, which is from the 1989 Surgeon General's Report.
(DFT. EXH. 105, "Reducing the Health Consequences of Smoking, 25 Years of Progress," a report of the Surgeon General, 1989, was marked for identification.)
BY MS. PARKER:
Q. If you'll look at the second page of that document, on the right-hand side, right-hand column --
A. Okay. I can't comment on whether I -- if this is the part that I worked on if I don't know what chapter it is and what the chapter heading was, please.
Q. Well, I'm not asking you that.
A. You don't care anymore whether I worked on it, right? I mean, you said before --
Q. I asked you if you worked on any part of the 1989 --
A. Yes, but I don't know --
Q. -- Surgeon General's Report?
A. -- which part because --

Q. Okay.
A. -- I can't tell --
COURT REPORTER: I need y'all to please speak at one time.
THE DEPONENT: I'm sorry.
COURT REPORTER: I need y'all to please speak one at a time.
THE DEPONENT: Okay.
BY MS. PARKER:
Q. Look at the right-hand column, please, which is page 139; do you see that?
A. I see the right-hand side column, yes.
Q. Okay. The second sentence, it says, "There is considerable evidence that the actual reduction in the dangerous chemicals in cigarette smoke is much smaller than implied by the FTC measurements"; that's what the 1989 Surgeon General's Report states, correct?
A. Correct.
Q. And --
A. This is not a chapter I worked on.
Q. Despite all of this knowledge that we've been

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going over, the FTC has still not made any changes to its testing method; isn't that true?

A. That's correct. That's probably why people are so confused, because government hasn't made clear

statements.

Q. And, in fact, the FTC operated with full knowledge of the problems with its test method all along; isn't that true?

A. No.

MR. PATRICK: Objection. Withdraw the objection.

THE DEPONENT: Absolutely.

Oh come on, object.

No, they don't have full knowledge of what's going on. To this day we don't have full knowledge of what the industry has done. We are now beginning to see the types of things that have -- that have -- take place in engineering, and I don't think to this day the commissioners -- that they have not used their subpoena power in this case to get the kind of documents they need to have full knowledge, and they have -- they have ideas about parts of it.

I know they get really upset every time the name FTC is mentioned. I told them to change the name of the procedure to something else so they won't feel so bad every time the FTC gets mentioned.

I'm through.

BY MS. PARKER:

Q. If a cigarette advertisement had contained an explicit health claim while you were at the FTC, you would have taken action to stop it, wouldn't you?

A. Unfortunately, it wasn't up to me.

Q. That's not my question. If you had seen a cigarette advertisement that contained an explicit health claim while you were at the FTC you would have taken some action to try to stop it, correct?

A. Oh, there were -- I would have taken some action? You mean, would I have made recommendations?

Q. Would you have done anything to try to stop a cigarette advertisement that contained an explicit health claim?

A. A federal employee is a -- a lawyer who works for a Federal agency whose obligation is to recommend action to their client, I would have recommended action.

Q. Okay. So if you saw a cigarette advertisement that contained an explicit health claim while you were at the FTC, as a lawyer at the FTC, you would have recommended that the FTC take action to stop that health claim, correct?

A. Yes, if I had seen it, or if it had been brought to my attention.

Q. But the whole time you were at the FTC, the FTC

did not stop any advertisements on the basis that they allegedly made explicit health claims; isn't that correct?

A. Okay. Well, first of all, that's different than

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whether I would have done anything, because I certainly did lots of things that didn't result in commission action. That's number one.

Number two, if by "explicit," you are referring to the very narrow definition that the word -- that is used in consumer and marketing literature, then I'm not sure I've ever seen an explicit claim in most advertising.

If you're talking about an implied claim based upon fairly explicit language, if we took action against R.J. Reynolds in cigarettes and science, I certainly would have taken action against a whole host of the ads in those series. If the commission only wanted to challenge cigarettes and science, I would have taken action against some of the low-tar claims, and on and on.

Q. Well, did you ever recommend to the FTC as the lawyer for the lawyer FTC, that the FTC challenge a low-tar, low-nicotine ad?

A. Okay. I mean, those are American brands and Barclay. How high up do I have to recommend it to --

Q. To anyone.

A. -- consider it -- I'm sorry.

Oh, yeah, lots of times to my boss.

Q. And they rejected your recommendations?

A. Uh-huh, yeah; except in the case of cigarettes and science, Barclay, and American brands.

Q. Now, I want to make sure I understand --

A. I got further on some than others.

Q. But they were all rejected, right?

A. Well, except those three.

Q. Except those three, they were all rejected, correct?

A. At one level or another, yes.

Q. Now, your only complaint about the cigarette ads is that they implicitly convey the message that smoking is consistent with good health?

A. I beg your pardon?

Q. Is it your complaint about these implicit health claims that you claim are in ads -- I'm trying to find out what your complaint is.

A. Cigarette and science, they basically said that cigarettes -- the association between the cigarettes and heart disease hadn't been proven, and therefore people ought to -- not to rely very heavily on what the government said. That's hardly -- that is not a health -- that's inconsistent with good health. I mean, the claims on cigarette and science were very explicit.

Q. No?

A. No.

Q. Isn't it correct that your complaint about cigarette advertisements is that they implicitly convey the message that smoking is consistent with good health?

A. All cigarette ads?

Q. The ads that you have these complaints about.

A. No, I had a different complaint about different ads. I mean --

Q. Did you have the complaint about some of the ads that the problem was that they implicitly conveyed the message that smoking is consistent with good health?

A. You mean, just that type of claim? Well, that

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was the basis of the '64 rule and the '71. I don't think I had them -- I don't think I looked at an ad that was that vague. There would have been much more explicit types of claims that I would have been interested in challenging.

Q. So were you, in your words, "interested in challenging" ads that you thought tended to minimize the health hazards of smoking?

A. No, I wouldn't characterize them that way. They were much more -- they were quite consistent with the cases I did bring.

Q. Well, would -- if it were up to you, would you prohibit advertisements that tend to minimize any health

hazards associated with smoking?

A. Well, if it were up to me, if I was the author of the FDA rule, I would get rid of most cigarette advertisements, so I'd get rid of the ads that implied -- I'd get rid of pictures, I'd get rid of colors, I'd get rid of anything that appealed to children, I'd get rid of -- I wouldn't get rid of ads that honestly discuss the risks.

I mean, that goes back to this discussion Lynn Kozlowski and I had, in which the economist at the FTC and I agreed on, which is that if there ever is a safer product, and it can be conveyed honestly, then it should be.

Q. I'm sure you've read the Supreme Court's opinion that came out in the FDA case, haven't you?

A. Tears all over it, yes --

Q. Okay. And that came out March 21st?

A. -- that was so wrong.

I don't know the date. I do know it wasn't March 23rd. Could have been, could have been that week.

Q. This is a ruling by the United States Supreme Court just over a month ago today, that the FDA does not have the authority to regulate tobacco, correct?

A. They certainly did, five to four, yes.

Q. And you were heavily involved in the drafting of

those regulations that the United States Supreme Court just threw out, right?

A. No. Actually, we -- what the -- what the Supreme Court threw out was the assertion of jurisdiction. It never really actually got to the regulations or the validity of the regulations or the wisdom of the regulations, it never made it to that, and threw out the assertion of jurisdiction. I worked on the rule. I didn't work on the assertion of jurisdiction.

Q. In fact, you were the primary drafter of the rule that was -- that asserted jurisdiction?

A. I was the primary -- no. The assertion of jurisdiction, there were two teams, assertion of jurisdiction team and the regulation team. I was on the regulation team. I was a primary author of all of the parts that had to do with advertising and was certainly heavily involved in most of the rest of the regulation.

Q. Let me show you a copy of that decision which we are marking as Exhibit 106.

(DFT. EXH. 106, U.S. Supreme Court Opinion, was marked for identification.)

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Studies http://industrydocuments.ucsf.edu/docs/ftfl0001

(Off-the-record conference.)
BY MS. PARKER:
Q. Okay. That's a copy of the United States Supreme Court decision, correct?

A. Yeah.
Q. It was decided March 21, 2000, correct?
A. Apparently, yes.
Q. Okay. Let me ask you, if you will, to look at page 1?
A. You mean the front page, the head notes?
Q. Actually, it's page 7 of the document.
A. Okay.
Q. The beginning of the opinion; do you see that?
A. Uh-huh.
Q. All right. The Supreme Court noted there that in 1996, the FDA --
A. I'm sorry; where are you? Okay. The second sentence.
Q. The second sentence, okay. The Supreme Court noted that, "In 1996, the FDA, after having expressly disavowed any such authority since its inception asserted jurisdiction to regulate tobacco products." Do you agree with that statement?
A. Basically, yeah.
Q. Let me ask you to turn over to page 12.
A. We were right, though.
Q. Not according to the Supreme Court.
A. I know. I know. I know.
Q. Okay. If you'll look at page 12, the very last

sentence on the left-hand column begins with the word "Given"; do you see that?
A. Yes.
Q. Okay. The Supreme Court concluded that "Given the FDA's conclusions concerning the health consequences of tobacco use, there are no directions that could adequately protect consumers; that is, there are no directions that could make tobacco products safe for obtaining their intended effects"; do you see that?
A. I do.
Q. Would you agree with that statement?
A. It's not consistent with the theory that we had.
Q. Well, do you agree with that statement?
A. No, I don't.
Q. Okay. What directions do you think could be given to make cigarettes safe?
A. The directions that we thought that would make cigarettes safe over time is children shouldn't smoke, and since all -- almost all users begin before the age of 18, if you can produce successive cohorts of non-smoker, you would, in fact, have safe usage in a period of time, there would be no users. That was the direction produced that we believed would be effective over a period of time.
Q. And the Supreme Court noted that congress has enacted numerous statutes governing tobacco products,

correct?
A. Correct.
Q. And on page 14, the very last sentence of the

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paragraph that began on the previous page says, "A ban of the tobacco products by the FDA would therefore plainly contradict Congressional policy"; do you see that?
A. Yes, I do.
Q. And that's what the Supreme Court said?
A. They certainly did.
Q. And you disagree with the Supreme Court in that statement?
A. Okay. I want to preface my statement by saying I didn't argue this case, I'm not a -- I was not the lawyer in this case and -- so I'm not an expert on this, and I disagree with that statement completely. That's my opinion.
Q. All right. Let me ask you to look at pages -- page 24.
A. You don't want to know why?
Q. If you'll look at page 24, please.
A. Okay.
Q. All right.
A. Am I still the majority, or have I made it to the dissent yet?
Q. This is -- if you'll look over on the right-hand

column, the next to the last sentence that begins with the word "Reading."
A. Okay. I just want to find out whether I'm still in the majority opinion.
Q. Still in the majority.
A. Okay. In the right-hand column, yes.
Q. The next to the last sentence begins with the word "Reading"; do you see that?
A. Uh-huh.
Q. Okay. It says, "Reading the FDCA as a whole, as well as in conjunction with Congress' subsequent tobacco specific legislation, it is plain that Congress has not given the FDA the authority that it seeks to exercise here"; do you see that?
A. I do.
Q. So the Supreme Court upheld the ruling of the Fourth Circuit of the United States Court of Appeals that these regulations were invalid, correct?
A. The Supreme Court upheld the decision of the Fourth Circuit that the assertion of jurisdiction was ultra vires. It was not appropriate. They never got to the regulation.
COURT REPORTER: The jurisdiction was what?
I'm sorry.
THE DEPONENT: Ultra vires, moot, u-l-t-r-a,

v-i-r-e-s.
BY MS. PARKER:
Q. So all of your work that you had done at the FDA on these regulations was found invalid by the Supreme Court, correct?
A. Actually, my work never was reviewed by the Supreme Court, the assertion of jurisdiction. Did it get abandoned? Absolutely, but it was not ruled on by the Supreme Court.
Q. Well, it's pretty much worthless right now; isn't it?
A. Well, you know --

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Q. It has no force and effect, correct?
A. You asked me if it was worthless; it wasn't worthless.
Q. It has no --
A. It has no force and effect.
Q. Right. Now, we have talked previously in your deposition about Premier?
A. Did we?
Q. Yes. On the first day of your deposition.
A. I have to take your word for it; I don't remember.
Q. Let me show you the next exhibit --
A. Are we through with this sorry decision?

Q. Uh-huh.
A. Okay.
Q. This is Number 107.
(DFT. EXH. 107, Petition to Classify, was marked for identification.)
MR. PATRICK: Since we're getting into another area, is there a way for you to evaluate how far we are going to be going this evening?
MS. PARKER: I hope we are about another 45 minutes, something like that.
MR. PATRICK: What time is Bill supposed to be starting in the morning?
MR. HILLMAN: 9:30.
MS. PARKER: 9:30.
MR. PATRICK: Could we -- could I suggest that maybe since he's not going to start until 9:30, that you could start earlier in the morning rather than going later on this evening?
MS. PARKER: Can you go on for another 30, 45 minutes?
MR. PATRICK: It's whatever -- it's up to you.
THE DEPONENT: Do I get to sleep in the morning if I say yes?
MR. PATRICK: If we go another 30, 45

minutes, will we start at 9:30?
MS. PARKER: We'll start at 9:30 tomorrow morning if you can go another 45 minutes tonight.
THE DEPONENT: Let --
MS. PARKER: And it may not take me 45 minutes before we break.
THE DEPONENT: Okay. I was going to say let's give it a try. I mean, I'm getting a headache, and I can't see too well, but...
MS. PARKER: That's fair enough.
THE DEPONENT: As long as we don't have to discuss that Supreme Court decision.

BY MS. PARKER:

Q. Let me show -- let me bring your attention to you what we just marked as Exhibit 107, and that is a petition that was sent to the FDA by the Coalition on Smoking or Health in 1988 to regulate Premier, correct?
A. Okay. Now, I was not at the FDA.
Q. Is that -- did I describe that document correctly?
A. I presume so, yes.

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Q. Have you seen this document before today?
A. I don't know.
Q. Okay.
A. I don't know.

Q. And the -- on the front page there, the Coalition --
A. You know, they submitted something; I don't know.
Q. On the first page there, the Coalition on Smoking or Health is comprised of the American Heart Association, the American Lung Association, and the American Cancer Society, correct?
A. Yes.
Q. And in this document, those three groups were petitioning the FDA, criticizing Premier as being portrayed as a safe or safer cigarette, correct?
A. I have no idea. I mean, if I read it, I could.
Q. All right. Well, let me --
A. I know what they're doing is they are -- they are claiming that Premier is a drug, and therefore comes within FDA's jurisdiction.
Q. All right. Let me ask you to look at the bottom of page 1 under the heading Introduction; do you see that?
A. Yes.
Q. Okay. The very last sentence, which goes on over to the top of page 2.
A. Uh-huh.
Q. Do you see where it says, "To date, this product," that's Premier, "has been portrayed implicitly,

if not explicitly, as a mechanism for a smoker to avoid and/or mitigate the risk of those diseases caused by traditional tobacco products"; do you see that?
A. Yes.
Q. All right. Let me show you the next exhibit, and we are up now to number 108?
A. Are we through with this or should I read it out?
Q. You can just put it to the side.
(DFT. EXH. 108, Letter to Frank E. Young, M.D. from C. Everett Koop, M.D., was marked for identification.)
BY MS. PARKER:
Q. Exhibit 108 is a letter from Surgeon General C. Everett Koop to the FDA, dated 1988, correct?
A. I don't know, mine says September 16th. I don't see a year on it. Do you have a year on yours? I don't see a year.
Q. Well, let me ask you if you'll at least agree that this is a letter from C. Everett Koop, who is the Surgeon General, addressed to the FDA?
A. To Dr. Young, yes.
Q. And in this letter, Surgeon General Koop is criticizing R.J. Reynolds advertisements for Premier because they suggest a health claim; isn't that correct?

A. I'd like to read the whole letter before I --
Q. Okay. I'll bring your attention, in particular, to the last bullet point on the first page.

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Source: https://www.industrydocuments.ucsf.edu/docs/ftfl0001

A. Okay. Now, your question, I'm sorry?
Q. Okay. In this letter Surgeon General C. Everett Koop is criticizing R.J. Reynolds advertisements for Premier because they suggest a health claim --
A. The letter --
Q. -- isn't that correct?
A. The letter seems to have a twofold purpose, one to indicate that Dr. Koop believes that the product is a drug and it should be within the jurisdiction of the Food and Drug Administration, and second that it makes implicit health claims, and that --
Q. Well, bringing your attention to the last paragraph, the last bullet point on the first page, it says, "To me, this suggests a health claim that the product is safe or safer than conventional products"; do you see that?
A. Yes.
Q. And that's what Dr. C. Everett Koop wrote, correct?
A. Correct.
Q. All right. Let me show you the next document, which is Exhibit 109?

A. That also gives the FDA jurisdiction, so that isn't just -- it's a double-barreled statement. It not only is a statement that was a health claim made that may or may not be true, but it's also a statement that given that statement, FDA has jurisdiction because health claims for products make something a drug.

(DFT. EXH. 109, 9/15/98 Letter to Frank E. Young from Coalition on Smoking OR Health, was marked for identification.)

BY MS. PARKER:
Q. Exhibit 109 is a letter dated September 15th, 1988, from the Coalition on Smoking or Health to the FDA, correct?
A. Yes.
Q. Have you seen this letter before today?
A. I don't know, probably not.
Q. Okay. All right. And this letter from the Coalition on Smoking or Health to the FDA, criticizes Reynolds advertisements of Premier also on the basis of health claims; is that correct?
A. I have to read it. Do you want me to read it?
Q. Take your time.
MR. PATRICK: Well, I just note that my copy only has three pages of what appears to be, at least a seven-page letter.

THE DEPONENT: Right, mine also.

BY MS. PARKER:
Q. Let me give you the rest of the pages, then.
A. And the question -- the question is what?
Q. You have three pages; is that right?
A. Yes, I only have 1, 2, and 7.
Q. We'll staple the rest of it.
My question is, if I could bring your attention --
A. Actually, I still don't have page 3 now.
(Tendered document.)

BY MS. PARKER:

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Source: https://www.industrydocuments.ucsf.edu/docs/ftfl0001

Q. If I could bring your attention to the second page, the very first paragraph there on the second page, it says, "We believe both the specifics and the overall theme of the advertisements are clear, use this product, and you will reduce your risk of cancer and possibly other diseases associated with the smoking habit. This product is a safer alternative to using the more conventional cigarettes"; do you see that?

A. Okay. Yes, that's there, uh-huh.

Q. All right. So we've gone over --

A. Did you just want to know whether that's what was said?

Q. Yes. We've gone over --

A. Not what they felt about that, but just that -- they just said that that's the claim they thought was made.

Q. I want -- I'm asking you if you agree that what I read is in the letter that we've marked here as Exhibit 109 from the Coalition on Smoking or Health to the FDA?

A. That's the first paragraph on the second page.

Q. Okay. Now, we've gone over statements by Surgeon General C. Everett Koop. We've just now gone over this statement by the Coalition on Smoking or Health, and we've also gone over the petition that was sent to the FDA by the Coalition on Smoking or Health. What other individuals or groups contacted either the FDA or the FTC to criticize Premier?

A. I have no idea who contacted FDA. I was not at FDA. I was at FTC. I know we heard from the Coalition on Smoking or Health. Who else did we hear from? I think we heard from them. Did we hear from anybody else? We didn't hear from C. Everett Koop, I know that; I don't think so, at least.

My most extensive recollections about Premier had to do with my discussions with Reynolds, as opposed to my discussion with any health groups.

Q. Well, my question is, what other individuals or groups contacted the FTC or the FDA to criticize Premier;

can you identify any other individuals or groups?

A. There were others, I can't identify them, and I specifically cannot tell you who contacted FDA, because I was not at that agency.

Q. Now, didn't the ads say Premier heated but did not burn tobacco; do you remember that?

A. It said heated, not burned. It had those little flavor capsules.

COURT REPORTER: I'm sorry; I didn't hear you.

THE DEPONENT: It had those little flavor capsules, so I know it talked about heating rather than burning, and I know it had to be tobacco if it was going to be a cigarette, so it might have talked about it, but I know most of the flavor came from the flavor capsules and not the tobacco.

(DFT. EXH. 110, Premier Ad, was marked for identification.)

BY MS. PARKER:

Q. Okay. Let me show you Exhibit 110, which is an ad for Premier. And now that you've looked at it --

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Studies http://www.industrydocuments.ucsf.edu/docs/ftfl0001

A. I haven't.
Q. Well, you've seen that ad before today; haven't you?
A. I have, but, you know, it's probably been 15

years. I don't know, when did it come out, 1980?
Q. 1988.
A. It's only been 12 years, then.
Q. Okay. And the ad says that Premier --
A. Heating tobacco.
Q. -- heats tobacco, not burns it.
A. So that's what it says.
Q. And then the ad also says that Premier was the, quote, cleaner cigarette; do you see that?
A. Cleaner smoke, pleasure, cleaner.
Q. And it also says that Premier reduced many of the controversial compounds found in the smoke of tobacco burning cigarettes, correct?
A. Right.
Q. Pardon me?
A. Yes, that's what it says.
Q. Okay. Now, what was your role in the discussions over the Premier?
A. I was at the Federal Trade Commission, I was still in charge of the tobacco program, Reynolds came in and described to us the product, we conducted an investigation to see -- you know, it was -- it was very unusual because the company came in before we asked them to come in. So they made a presentation, and we started an investigation of the types of evidence that had been

amassed by Reynolds, as well as the consumer perception of the advertising.
Q. Did you have -- ever have any discussions with anyone with the Coalition on Smoking or Health regarding Premier?
A. I'm sure I did.
Q. Okay. Do you remember whether or not you ever had any discussions with Surgeon General Koop or anyone from his office regarding Premier?
A. 1988? I may or may not have. I mean, I was on the inner agency Committee on Smoking or Health, which was chaired by Dr. Koop, and I met with him on various occasions. We may or may not have discussed Premier; I don't know.
Q. Did you advise the FTC to challenge the Premier ad?
A. It was withdrawn from the market before we could have a chance to make a recommendation to the commission.
Q. The -- so you had -- you and no one else on the FTC staff had made a recommendation to the FTC at the point when the Premier ads were withdrawn from the market?
A. The product, correct.
Q. In 1988, when these Premier ads came out, didn't you think there should be a place in the market for smokers who are seeking ways to reduce the risk?

A. As I said before, Lynn Kozlowski and I talked about this, and we thought a discussion needed to be had about reduced-risk products, whether there was a place for

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them and how they could be advertised.
We didn't know enough about the product or its marketing at that time to have a recommendation, but I believed then, and I still believe now, that there are people who will smoke long into the foreseeable future. And if we could reduced the risks associated with that smoking, that would be a benefit.
Q. And for those smokers who are seeking ways to reduce the risk, don't you agree that those consumers have a right to know if there's a cigarette that has those features?
A. Such a loaded question. I have grave concerns about how -- well, okay, I have grave concerns, one, about whether a product is a reduced risk. As I said, the problem that the government had at the time that I was there in '88, at the time Eclipse came in later, was that the government is not in the possession of the information.
Unlike any other regulated industry, the information about the product is in the hand of the manufacturer, not in the hand of the government, so it has no way of evaluating whether the product is indeed reduced

risk. That is the first problem.
The second problem is how you can -- if it were, if it were a reduced risk, how would you convey that to consumers so that those smokers who might otherwise quit are not discouraged from quitting. And those smokers -- those people who might not have entered the cigarette market would not enter, because even if it's cleaner, it's still deadly.
Q. When you were at the FTC, did you think that these claims that are in the Premier ads implied that Premier reduced the risk of smoking?
A. Absolutely.
Q. You did?
A. Uh-huh.
Q. Okay. Would you agree that in 1988, when these ads came out, there was not enough agreement in the scientific community regarding what R.J.R. had to prove in order to show that Premier was, in fact, safer?
A. I think that's true, then and now.
Q. Okay. And you understand that Premier failed in the marketplace, correct?
A. Oh, it -- it failed.
Q. Okay. And you understand that R.J.R. withdrew it from the market, correct?
A. I think that's true.

Q. Okay.
A. I know that they still make it available -- is it Premier they still make available to people in Winston Salem? One or other of them is still available, I think to some people, but not commercially in the sense of nationwide or --
Q. Did you understand that consumers pretty much hated the Premier product?
A. Oh, I have a confession, I liked it. They came in, they asked if I wanted to smoke it, I did, I loved it. I'm a very small market.
Q. Your reaction was not consistent with what --

http://legacy.library.ucsf.edu/tid/shq07a00/pdf Source: https://www.industrydocuments.ucsf.edu/docs/ftfl0001

A. Apparently not.
Q. -- the vast majority --
A. Apparently it smelled really bad. I think it was described real nicely by barbarians at the gate.
COURT REPORTER: It was described real nicely in what?
THE DEPONENT: Barbarians at the gate.
BY MS. PARKER:
Q. Let me ask you here since you're --
A. Someone on my staff described it as burning poi, which I think -- I've never been to Hawaii, but I'm told it's horrible.
Q. Since you're an expert witness here, let me ask

you this, if Premier had not been voluntarily withdrawn from the market by Reynolds, do you think the FTC would or would not have taken action against R.J.R. for making an implied health claim?
A. With those five commissioners, or would I have recommended?
Q. Well, let me ask you first if you would have -- you, personally, would have recommend that the FTC take action against R.J.R. for making an implied health claim through these Premier ads?
A. We were at the very beginning of our investigation; I needed to see more of their substantiation and to have it reviewed to know if they had the correct kinds of substantiation. I also needed to do more consumer perception work, to see whether consumers took away from these ads the notion that Premier offered a reduced risk across the board, not just in one or two diseased areas.
For example, cardiovascular disease is still the number one killer from cigarettes, and there is no reduction in that. The consumers believed that there was that kind of reduction.
Had we found that the substantiation, that the tests done been inadequate or that the consumers had this misperception, I would have recommended the commission

that they take action.
If you're asking me in 1988 whether the commission would have taken action, I doubt it very seriously.
Q. Back in 1988, what would R.J.R. have had to show to the FTC to prove that Premier was safer than tobacco-burning cigarettes?
A. I can't answer that. I had not gotten on board the -- it really bombed quickly, in FTC terms. I mean, we hadn't even hired consultants yet to start working on the types of analysis that we would have liked to have had.
Q. So you did not consult with anyone about what R.J.R. would have to show to prove that Premier was safer?
A. I didn't consult, I talked with lots of people, but I don't think we had begun an intensive investigation.
Q. What did the health community tell you about what would be necessary for R.J. Reynolds to show in order to support a risk reduction claim for Premier?
A. I'm not sure they had specific recommendations. I think that they were so mistrustful.
Q. Are you familiar with the Premier monograph?

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Studies http://tobaccoindustrydocuments.ucsf.edu/docs/ftfl0001

A. I am.
Q. And that was a collection --
A. That big. (Indicating)
Q. That big. That was a document collection

provided to the FTC by Reynolds voluntarily about the Premier product. --
A. Right.
Q. -- correct?
A. Correct.
Q. All right. Do you recall that R.J.R. also filed Affidavits of independent scientists regarding the ability of Premier to reduce smoking-related risks?
A. There were Affidavits. I'd have to see them again to remember what they specifically dealt with. I think each one dealt with a different expertise area. I know I was told that not all the right tests were done.
Q. Do you know Dr. Fred Bock?
A. I know Fred Bock.
Q. Okay. Did you consider him an independent scientist?
A. I would. I don't remember what his opinion -- what he expressed an opinion on.
Q. Did you say you would consider him an independent scientist?
A. He was one of my witnesses in Barclay.
Q. How about Roger Novak, do you know --
A. I don't know Roger Novak.
Q. You don't know him. Dr. Rudolph Jagger (ph)?
A. I don't know Dr. Jagger.

Q. Okay. In your opinion was Premier a safer cigarette?
A. I don't know.
Q. Did you ever tell the FTC that Premier was a safer cigarette?
A. That it was, categorically? I doubt it.
Q. Did the public health community conclude that Premier was a safer cigarette?
A. Did the public --
Q. Health community.
A. Well, you know, one of the reasons we formed this committee was it's so unclear as to what the public health -- who and what the public health community is, and we were trying to provide a forum for that to occur.
Members of the public health community certainly complained a lot about the product. I would say the fire storm created by the public health community probably didn't help Eclipse -- Premier, excuse me.
Q. I asked you just a minute ago was Premier a safer cigarette, and you said you didn't know, correct?
A. Uh-huh.
Q. Okay. Is the reason that you don't know because there's no criteria in 1988, no guidelines in 1988, for determining whether or not a cigarette like Premier was safer?

A. There's several reasons. First of all, I'm not even sure what short-term studies should be done and which ones are the correct ones. But even if those short term

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studies could be determined and you could come up with a research matrix of what studies should be done, we don't know what short-term studies would be predictive of long-term health consequences.

So if and when a cigarette is produced that is less hazardous, you know as proposed legislation, how I like to refer to it, it would have to be a guess as opposed to any sort of guarantee.

Q. Do you -- you know the name Dr. Michael Russell, correct?

A. Yes.

Q. And were you aware that in 1993, he sent a letter to Reynolds about Premier?

A. In 1993... Probably not --

Q. Let me show you --

A. -- unless he made it public in a place where I would have seen it.

Q. Let me show you the next document which is 111.

(DFT. EXH. 111, 5/7/93 Letter to Carl Ehmann from M.A.H. Russell, was marked for identification.)

BY MS. PARKER:

Q. This is a copy of the letter. Have you seen that before today?

A. I don't think I have.

Q. Okay. Let me bring your attention to the very last sentence of the whole letter, over there on page 2.

A. Oh, I see, he's got...

Q. Okay.

A. Okay.

Q. The last sentence begins with the word "My motives"; do you see that?

A. Yes.

Q. He states that -- he says, "My motives in writing to you are that as a scientist and as someone with a concern for health, I would be very disappointed if a product with this potential were to be abandoned"; do you see that?

A. I do.

Q. Okay. And on page 1 of the letter, Dr. Russell states that he thinks Premier has tremendous potential, and that's the very first paragraph, seventh line, it starts with the word "Basically"; do you see that?

A. Uh-huh.

Q. "Basically, I think the Premier has tremendous potential for low-risk, long-term nicotine use, and that the response to it in your country was political and

irrational"; do you see that?

A. Uh-huh.

Q. Do you agree or disagree with that statement I just read?

A. I probably wouldn't go to the lengths that Michael went to.

Q. Would you --

A. Michael Russell believes that there is a certain segment of society that needs addictive products, and he believes there should be safer addictive products on the market, because people will use whatever is there. That's, for instance, why he thinks snuff is terrific.

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Source: https://www.industrydocuments.ucsf.edu/docs/ftfl0001

As I said, I don't disagree with the notion that we need to look very seriously at the development of products that have potential for less harm.

Q. And that very same paragraph, if you'll go to the next -- well, two sentences after that begins with the word, "I realize"; do you see that?

A. Yes.

Q. It says, "I realize also that your company," and that's R.J. Reynolds, "was handicapped in being unable to promote it as a safer product"; do you see that?

A. Uh-huh.

Q. Do you agree with that statement?

A. I don't know what he means. You were

handicapped because you couldn't or wouldn't explain what the product was about? You know, the sentence in isolation --

Q. Let me ask you to go ahead and look at the very last sentence on that first paragraph on page 1, it begins "Our advisory committee"; do you see that? Do you see that sentence?

A. I actually want to read down until I get to that.

Yep.

Q. It says, "Our advisory committee on smoking and health is aware of and accepts the need to maintain nicotine delivers while achieving further reductions in more harmful components in their program for lower risk cigarettes"; do you see that?

A. Michael Russell has always believed that the key is the ratio, higher tar, lower -- I mean, higher nicotine, lower tar, so that if you compensate, you're not getting more tar.

Q. Dr. Russell advocates low-tar cigarettes, correct?

A. He advocates high-nicotine, low-tar.

Q. So he advocates low-tar cigarettes that have a slightly higher nicotine, correct?

A. I would say he recommends cigarettes -- well, if

there have to be cigarettes on the market, he would recommend that the higher the nicotine-tar ratio, the better.

Q. And then the first sentence of the last paragraph on the page, it begins, "I write"; do you see that?

A. Yes.

Q. He says, "I write because in my view, it would be very sad if you were able -- if you were" -- I'm sorry; let me start over again.

"I write because in my view, it would be very sad if you were to abandon further development of such a potentially valuable product"; do you see that?

A. I see that, I do.

Q. And, in fact, he goes on and concludes that he would be very disappointed if a product with this potential were to be abandoned, right?

A. That's what he says, yes.

Q. Do you agree with Dr. Russell that Premier was a potentially valuable product?

A. I don't know whether Premier was a potentially

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valuable product. I would agree with Dr. Russell that it would be a shame if the companies did not try to produce safer products.

Q. Dr. Russell also did a study on Premier and

enclosed that study with this letter, correct?

A. (Pause.)

Q. Do you see that study?

A. Yeah, I'm trying to see what it says.

I have no idea what product he's testing here. He says, "Virtually tar-free," so I don't know what product he's testing.

Q. Well, let me ask you to look at the abstract on the first page.

A. Yeah, that's where I was looking, there.

Q. Okay. It says, "Average nicotine intake was reduced by 44 percent while estimated tar intake was reduced by about 90 percent. Such cigarettes pose substantially less risk of cancer and chronic obstructive lung disease than conventional cigarettes"; do you see that?

A. Yes, but as I said, I don't know what he meant by virtually tar-free, what product he's referring to.

Q. Okay. Well, if you look in the -- maybe this will help you, if you look on the first page of that article, if you'll look in the third paragraph that begins "An American tobacco company recently developed a virtually tar-free cigarette brand name Premier"; do you see that?

A. Yes.

Q. Okay.

A. I don't know why he would call that virtually tar-free, though. It wasn't my understanding that it was virtually tar-free. It had a lower yield and the tar was substantial -- was comprised substantially differently, but I don't remember hearing it described as virtually tar-free.

Q. Let me ask you to look at the third page of his study, the first full paragraph begins with the word, "Although"; do you see that?

A. (Pause.)

Q. Do you see that paragraph?

A. Yes.

Q. It says, "Although it would be far better to give up smoking altogether, there is no question that the risk of tobacco-related cancers and chronic obstructive lung disease would be substantially reduced possibly by as much as 90 percent for the average smoker who switched to glycerol particle cigarettes"; do you see that?

A. I'm sorry, I don't know where -- again, I am not even remotely competent to comment on that kind of statement.

Q. So sitting here today, you don't know of any reason to disagree with Dr. Russell's conclusions?

A. It's neither to agree or disagree.

Q. Okay.

A. Certainly, tar in the lungs is what causes lung cancer, but whether this would reduce it 90 percent, I

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don't know.
Q. All right. Now, you had told us on the first day of your deposition that you brought with you the documents that you were relying on. We copied those and gave them back to you.
A. Well, you gave -- yeah.
Q. Right?
A. Right.
Q. Okay. And three of the documents in that set were documents from Reynolds that you indicated you might be relying on.
A. That I might.
Q. And we marked those three documents separately; do you remember that?
A. Yeah.
Q. Okay. Those were Exhibits 59, 60 and 61, and I want to ask you some questions about those. First of all, if I could ask you to pull out Exhibit 59; do you see that?
A. Yes.
Q. Okay. Exhibit 59 appears to be a four-page Reynolds memo to Drs. Henley and Lloyd from Shannon?

A. I'm sorry; I don't have 60. I don't have 59.
Q. You don't have Exhibit 59?
A. No.
Yes, here I do, it's under 50.
Q. Okay. Exhibit 59 is a four-page Reynolds memo to Drs. Henley and Lloyd from M.D. Shannon; correct?
A. Yes.
Q. And it's dated August 5th, 1980, correct?
A. Correct.
Q. Was this document provided to you by Plaintiff's counsel?
THE DEPONENT: Was this provided to me by Plaintiff's counsel?
MR. PATRICK: I believe so.
THE DEPONENT: Okay.
BY MS. PARKER:
Q. Do you know why Plaintiff's counsel sent it to you?
A. I asked for documents that they might have in their possession that were not confidential that I could look at.
Q. Did you ask for documents on any particular topic, or did you just ask for any documents?
A. I asked for documents that might have to do with low-tar cigarette construction, that generalized topic. I

know in the documents that I got, they were all over the place, there were a lot of documents.
Q. Do you know Dr. Henley or Dr. Lloyd or Mr. Shannon?
A. No, I don't.
Q. Okay. Now, you put some different colored Post-its and flags there on the document.
A. Yeah.
Q. All right. Is there any significance to those Post-its or tabs?
A. No, as I told you before, it just happened to be whatever I had in the drawer.

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Q. Is there anything that you're relying on on this document that was marked as Exhibit 59?
A. That I'm relying on?
Q. Uh-huh. I mean, was this just background reading, or is this something that you're relying on for your expert opinion?
A. Well, I think that -- you know, what I wanted to look at, because I had seen it in -- when you leave a Federal agency, you leave everything you worked on behind. In my work there, I had seen documents that talked about what the industry knew, when it knew it, about certain products.
In my discussions with them, I said I was aware

of documents that showed that the industry knew more about low-tar products than the government, and that they used this knowledge to create products in advertising that I thought were deceptive.
Q. Let me ask you to look at your disclosure that we've marked previously as Exhibit Number 10 on the first day of your deposition.
A. Okay. Okay.
Q. Okay. And this is your statement of opinions, correct?
A. Yes.
Q. All right.
A. I'm sorry.
Q. Are you aware that the low-tar, low-nicotine smoking that the Plaintiff in this case did, that Mr. Little did, was of Barclay and Carlton?
A. Okay. I know it was Carlton.
Q. I just see so much in your disclosure about Barclay and Carlton.
A. I knew he smoked -- no, I don't know; I was told he smoked Carlton, and I may have been told -- did he smoke Barclay?
COURT REPORTER: Did he smoke what?
THE DEPONENT: Barclay. I may have been told he smoked Barclay. Truthfully, I don't know why

R.J. Reynolds is here because the two companies I had heard referred to all had products made by what is now Brown & Williamson.
BY MS. PARKER:
Q. Well, that's my next question. I don't see anything in your disclosure that relates to any low-tar, low-nicotine issues of my client, R.J. Reynolds; is that correct?
A. You know, you mean that I took on at the commission? Absolutely not, no. The...
Q. Well, anything in your expert opinions that you're planning to give here?
A. Do they have anything to do with your client?
Q. Are you -- let me start again. In your expert testimony that you are planning to give in this case, that's based on your statement of opinions, right?
A. My opinions are formed by the work I did at the Federal Trade Commission and the work I did at the Food and Drug Administration, although the two litigations or administer of actions that are referenced by Brown & Williamson and American brands, the information that I

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possessed on the issue of low-tar products includes more than just those two products.

Q. But I'm not asking you about what you did --

A. You're not asking me that?

Q. -- at the FTC, I'm asking you what you're going to testify about in this case. Okay? Now, let me go back, do you understand that when you're an expert witness, you give the other side a statement of your opinions, and that's what you did here?

A. Right.

Q. Right. And that's what's been marked as Exhibit 10, right?

A. Uh-huh.

Q. Okay. That's the statement of your opinions. And the statement of your opinions is, I assume, a summary of what you're planning your expert testimony to be in the case, right?

A. (Moves head up and down.)

Q. Is that a yes?

A. That's a yes.

Q. Okay. My understanding, from reading your statement of opinions, is that what you're planning to do in this case is to give expert testimony that relates to Carlton and Barclay and not against any brand of R.J. Reynolds; is my reading correct?

A. No, that's not correct. I think if you look at --

MR. PATRICK: Go ahead.

THE DEPONENT: No, no, please. Do you want

to say something?

MR. PATRICK: I would just -- I would just say that if you would look at paragraph 8 --

THE DEPONENT: Yeah.

MR. PATRICK: -- that other low-tar, low-nicotine products may become relevant, even if not smoked by the Plaintiff, as far as her opinions may be concerned about low-tar and low-nicotine products, generally.

So that's all I'll say.

THE DEPONENT: Yeah, I was going to say paragraph 8 isn't limited to Brown & Williamson and American brands.

BY MS. PARKER:

Q. So you agree with Mr. Patrick's statement?

A. I think so.

Q. What I'm trying to get at is, and you raised this yourself, you said, you didn't understand what Reynolds was doing here, just a couple minutes ago; do you remember saying that?

A. Yeah.

Q. Okay.

A. It seems that he predominantly smoked Brown and Williamson's product.

Q. That's what I'm trying to get you to confirm,

that your testimony that you're planning to give in this case, your testimony about your experience at the FTC and everything else we've been going over, that relates to

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Mr. Little's low-tar, low-nicotine smoking, not to his smoking of full-flavor cigarettes; is that right?
A. Oh, so in other words, you're not asking me will I talk about low-tar products, FTC testing, industry documents about what they knew about it, but just whether Mr. Little smoked high-tar products, and what I know about that?
Q. No.
A. Okay.
Q. Let me try again.
A. Okay.
Q. All right. You said a few minutes ago that you didn't know what Reynolds was doing here. Okay. Do you remember that statement?
A. Yes.
Q. All right. Do you agree with me that in terms of this case, I'm not talking about what you did at the FTC, so just put that aside, but in terms of this case and the expert testimony that you're planning to give in this case, that expert testimony is -- you're planning for that expert testimony to relate to Mr. Little's low-tar, low-nicotine smoking; is that right?

A. And low-tar and low-nicotine products in general, FTC testing of those products, and --
Q. Right. In this case, with this Plaintiff, with Mr. Little, the low-tar, low-nicotine smoking history is of products other than Reynolds' products, right?
A. I can't answer that. I mean, I'm not testifying about what Mr. Little did.
Q. Okay. So if you were told that -- if everybody -- if you were told that everybody agrees that Mr. Little smoked low-tar, low-nicotine products of a company other than Reynolds, okay?
A. Okay.
Q. If you're told that information, then wouldn't you agree with me that the testimony you're planning to give here would not relate to Reynolds?
MR. PATRICK: Let me just object. Assuming that all the evidence is that all of the products that he smoked that were low-tar, low-nicotine were of other companies other than Reynolds, just making that assumption, because there may be evidence of some smoking of one of Reynolds' products, but I'm not saying that.
THE DEPONENT: Assuming for the sake of argument, that he only smoked Brown & Williamson product? Then what was the question again?

BY MS. PARKER:
Q. Assuming for the sake of argument, the low-tar nicotine products that he smoked were not Reynolds' products --
A. Okay.
Q. -- then would you -- am I correct that the testimony you are planning to give here today would be -- in this case, would be for products other than products of R.J. Reynolds?
A. Well -- and I may be all wrong on this, and I'd have to go back and read my evidence textbooks, but I thought I was going to be asked about low-tar products in

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general, as well as specific products, so that it would have to do with general questions, as well as specific questions. And so it might involve information that involves a whole host of products and not just those he smoked. I mean, I guess --

Q. Well, what do you mean when you said you didn't know what Reynolds was doing here?

A. Well, if he smoked -- if he smoked Barclay and American -- and Carlton, it seems to me they have the bigger stake in the action, that's all. Although it never surprises me, because when I see the companies together, because they often do things together.

Q. Let me ask you to look at what we have

previously been going over here as Exhibit 59?

THE DEPONENT: Are we going to go much longer? It's almost 7:30.

MS. PARKER: Whenever you want to stop, let us know.

VIDEOGRAPHER: I have five minutes or so.

MS. PARKER: How about we go five minutes until the tape goes out?

THE DEPONENT: I don't know if it's the tape or me.

MR. PATRICK: That's a good stopping point.

THE DEPONENT: And the number.

BY MS. PARKER:

Q. 59, that we have been going over.

A. All right.

Q. Now that we have gone over your disclosure in the case, what is it, if anything, in Exhibit 59 that you're relying on in this case?

A. I found it a very interesting discussion amongst the members of this company that they were examining why smokers might use these ultra low-tar products, they want to quit, but they can't, they have low self-esteem, and then how do we talk to these people if that's what they are. They can -- they can't see the burn rate, draw and draft resistance, difference in puff counts -- difference

in puff counts are not readily perceived, ULT smokers are very much aware of the function of elimination holes and feel cheated by them, the elimination of visible holes could be a positive benefit.

Q. Are you reading the highlighted part of the pages?

A. Yes, that's on page 4. I think the document, as whole in that sentence, in particular, indicates that there were those within the Reynolds organization that believe that tricking these guys was certainly fair play. We have to know why they have changed to smoking them and make sure that we have a way of keeping them smoking.

Q. Okay. What are you referring to when you --

A. Well, as I say, the most specific is the elimination of visible holes could be a positive benefit. These guys feel cheated, and therefore, if you eliminate them, they won't feel cheated, because they won't know they're there. It seems to me to be an indication that Reynolds knew what it was doing.

Q. Do you have any knowledge that Mr. Little ever smoked an R.J. Reynolds' cigarette?

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A. Do I have any knowledge?
Q. Yes.
A. I don't have any knowledge that he smoked any cigarettes.

Q. Let me ask you about Exhibit 60 that's been marked previously.
A. Okay.
Q. Do you see that? Okay. That is a 1980, two-page Reynolds' memo from Dr. Mansfield; is that correct?
A. Yeah.
Q. Was that document provided to you also by Plaintiff's counsel?
A. I'd presume so, yeah. I think it is. As I say, I've got some documents from them. I've got some documents from Stan Lance's book, so I don't know.
Q. You don't know where you got this document?
THE DEPONENT: Do you know where I got this document from?
MR. PATRICK: You got it from us.
THE DEPONENT: I think I got it from them.
BY MS. PARKER:
Q. Are you relying on any part of the document that's been marked as Exhibit 60, with respect to the testimony that you are planning to give in this case?
A. I think what I found interesting in this study was a recognition by Reynolds, that some low-tar cigarettes had more mutants than high-tar, and some had less, indicating at least their awareness. A surprising

finding of the present study is the fact that some of these low-tar cigarettes show a high rate of mutagenicity per milligram of tar, and these include Carlton, Merit, Kent, and Doral.
COURT REPORTER: I'm sorry; could you slow down?
THE DEPONENT: Okay. Where did you lose me?
COURT REPORTER: Carlton, Merit and something.
THE DEPONENT: Carlton, Merit Kent and Doral, D-o-r-a-l.
BY MS. PARKER:
Q. What expert opinion are you planning to give in this case that relates to the document?
A. Again, an awareness on the part of Reynolds that -- as an example, an awareness on the part of the company that low-tar cigarettes were not necessarily more beneficial than high-tar cigarettes.
MS. PARKER: Let's go ahead and stop for the evening, but I just want to state on the record that we have not completed or concluded the deposition; we are just stopping for the day.
THE DEPONENT: I can't talk to him, and I'm going to go back to my room.
VIDEOGRAPHER: Off the record at 7:25 p.m.
(The deposition concluded at 7:25 p.m.)

CERTIFICATE OF REPORTER

I, Madonna M. Farrell, Registered Professional Reporter and Notary Public in and for the

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State of South Carolina do hereby certify that the deponent, JUDITH WILKENFELD, was duly sworn by me to testify to the truth, and that the above deposition, pages 3 through 813, inclusive, was recorded stenographically by me and transcribed through computer-aided transcription by me to the best of my ability.

I FURTHER CERTIFY that the foregoing transcript is a true and correct transcript of the testimony given by the said witness at the time and place specified.

I FURTHER CERTIFY that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken, or financially interested in this action.

IN WITNESS WHEREOF, I have set my hand and seal this 10th day of May, 2000.

Madonna M. Farrell
Registered Professional Reporter
Notary Public
My Commission Expires
October 20, 2005

VERIFICATION OF DEPONENT

I, JUDITH WILKENFELD, have read the foregoing deposition consisting of 272 pages which was reported by Madonna M. Farrell, Registered Professional Reporter and notary public in and for the State of South Carolina on April 25, 2000.

I find the transcript of this deposition to be a true and accurate transcript according to my testimony on that date with the exception of corrections as listed on the attached correction sheet, which was filled in by me.

JUDITH WILKENFELD

, 2000

ERRATA PAGE

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THE ABOVE CHANGES WERE NOTED BY ME ON THIS ERRATA PAGE BEFORE SIGNING THE ATTACHED VERIFICATION OF DEPONENT. I HAVE RETAINED A COPY OF THIS ERRATA PAGE FOR MY RECORDS, AND THE COURT REPORTER IS TO ATTACH THIS PAGE AND MY VERIFICATION TO THE ORIGINAL TRANSCRIPT.

DATED:

JUDITH WILKENFELD

I N D E X

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